Oxford Social Studies Pamphlets

HUMAN RIGHTS IN THE UNITED STATES

STARR

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By

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New York

OXFORD BOOK COMPANY

1951

PRINTED IN THE UNITED STATES OF AMERICA

PREFACE

The struggle for human rights—man's striving to attain dignity and security in an organized social group—is one of the most inspiring and significant chapters in history. What we Americans often tend to regard as an exclusively Anglo-American tradition is really a worldwide ideal, expressed clearly in such diverse sources as the Bible, the *Analects* of Confucius, and the Funeral Oration of Pericles. In all ages and all parts of the world, men have struggled to secure these basic privileges and guarantees, referred to variously as "natural rights," "inalienable rights," "God-given rights," "the rights of man," "the rights of Englishmen," "civil rights," and "civil liberties."

In this pamphlet, the Author has selected several key areas of human rights in the United States and has attempted to present the issues (for the most part) as they were submitted to, and adjudicated by, the Supreme Court. This approach has a number of advantages. In the first place, the many rights which are part of the American heritage can be understood most clearly when a conflict or issue develops as to their meaning, and an "umpire" is called in to decide the case. Then, and only then, can we truly see the nature, scope, and limitations of our rights. Moreover, basing the discussion on judicial decisions, which involve interesting and often dramatic human situations, has the effect of "personalizing" the subject matter. The generalities, abstractions, and rather remote formulations which often characterize studies in this field are not likely to attract or hold the attention of high school students.

The text of this pamphlet is supplemented with a variety of visual material, designed to arouse the student's interest and to point up the historical background and implications of the subject matter. Each chapter is followed by a group of "Things to Do," including thought questions, recommended reading, suggestions for classroom discussion and debate, and many other activities.

It is hoped that this discussion of human rights will clarify some of the legal problems that have arisen in our society and will stimulate the students to further reading and thinking on the subject. Even more important as an end result is the development of a conviction that a society based on human rights requires daily action and daily *living* in defense of those rights.

I. S.

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CHAPTER 1

THE AMERICAN TRADITION OF HUMAN RIGHTS

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."
>
> —Supreme Court Justice Robert A. Jackson
> (*West Virginia Board of Education v. Barnette,* 1943)

"I Know My Rights!"

Here is one of the most typically American expressions. Almost all of us, at one time or another, have used these words to clinch an argument or to "tell off" someone who, we felt, was trying to take unfair advantage of us. We are truly a "rights-conscious" people.

Carl Becker, noted American historian, once said that Americans know their rights as well as they know their multiplication table. What Professor Becker meant by this is that the average man would have no trouble in drawing up a list of the basic rights which he enjoys—or which he thinks he should enjoy.

The fact is, however, that most of us have only a vague understanding of the rights which we can recite so glibly. In this respect, the comparison with the chanting of a multiplication table is an apt one—and far from complimentary. How many of us have ever thought seriously about the nature of these rights, their origin, and their ultimate value both for the individual and for the community?

One key idea which we can start off with is that human rights spring from man's spiritual urge to attain dignity, self-respect, and security in a civilized society. To understand the relationship between man's desire for liberty and his need for an orderly society is the first significant step in the protection of our precious heritage.

What Rights?

We are justifiably proud of the rights we enjoy and determined to defend them. But what are these rights specifically? More than four score years ago, Abraham Lincoln said:

> "The world has never had a good definition of liberty, and the American people, just now, are much in need of one. We all declare for liberty but in using the same word we do not all mean the same thing."

Evidently, there is a great gulf between using a word glibly and knowing exactly what it means.

The first point that occurs to us in trying to think realistically about liberty* is that it is not absolute or unlimited. In other words, even under the best conceivable conditions, there must be some restrictions on our freedom of action. Many examples of this can be cited from everyday life. Thus, boys and girls up to a certain age are required by law to attend school. We have the privilege of driving a car only if we obtain a license and observe our traffic regulations. We have freedom of speech and press, but people may be sued for slander or libel, and also tried for sedition. We are proud of our right to worship how, when, and where we please, but the law has forbidden practices connected with certain religious sects.

There is no doubt that in a civilized society, the individual's rights must be limited, but various people have different ideas as to what the necessary and proper limitation is. One person may be outraged by an incident which another accepts with shoulder-shrugging indifference. Is your sense of justice ruffled when you read of a Negro convicted by an all-White jury from which Negroes have been deliberately excluded? Are you disturbed when you learn that telephone wires have been tapped by agents of the law? What do you think when you hear that the "third degree" is still being used, despite the constitutional provision that no man can be forced to testify against himself?

Lincoln was right: liberty *does* mean different things to different people. If we are to gain an understanding of liberty which is sound, in terms of history and of today's world, we must try to assemble the basic facts and ideas—the roots of our heritage of human rights.

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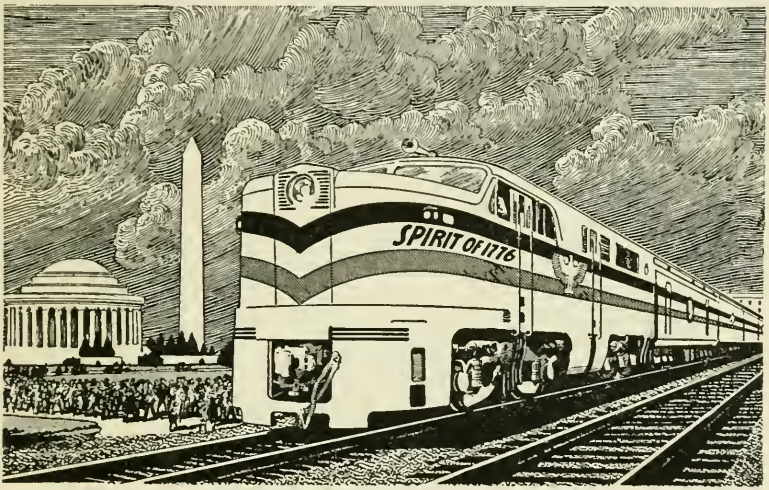
*We shall use the words *liberty* and *freedom* interchangeably in this pamphlet. Also when we refer to *rights*, it will be understood that we have in mind the rights needed to secure our liberty or freedom. Thus, all three terms (*liberty*, *freedom*, and *rights*) will be considered roughly equivalent for the purposes of this discussion.

"The Great Mr. Locke"

In the fall of 1947, the Freedom Train began a tour of the cities of the United States. The seven railway cars which made up this train contained an exhibition of the great documents which have played a vital part in establishing and securing our most cherished rights. Among these immortal papers (which included the original copies of the Declaration of Independence and the Federal Constitution), were two notable English documents: the *Magna Carta* and John Milton's *Areopagitica*. This is hardly surprising, for the roots of our liberties were planted in England.



The Freedom Train

It is ironical that many of the early settlers who fled to the New World to escape the persecution of European tyrants set up tyrannies of their own as soon as they arrived here. But this attempt to impose orthodoxy in religion and politics was doomed to eventual failure. A new society was growing up on this vast continent, and the dead hand of the past could not retain its influence. No enterprising man, however poor or humble, would consent to being "pushed around" by his "betters" when there was unlimited free land waiting for him beyond the frontier.

The political philosophy which grew up in this stimulating new environment was drawn from many different sources, but no single element was more important than the teachings of the noted English thinker John Locke (1632-1704). The Founding Fathers were thoroughly grounded in the natural-rights philosophy of

"the great Mr. Locke." Many of them had made a careful study of his *Second Treatise on Civil Government.* The American Revolution, the Declaration of Independence, and our Constitution were, in large part, rich fruits of the seeds planted by that great English political philosopher.

In 1215, King John of England accepted the *Magna Carta,* acknowledging certain limits to his authority. The King, as shown here, took this step reluctantly, under pressure from his nobles. *Magna Carta,* although a product of a feudal society, is considered the first great document in the Anglo-American tradition of human rights.

The Social Contract Theory

All the outstanding political philosophers in history have been concerned with the key problem of freedom versus order. They have all pondered the reasons for the rise of civil authority and the relationship between the good life and the good society.

It is believed by many that the "law of tooth and claw"—the law of the jungle—must have been the accepted mode of life before the rise of civil society. In the classic phrase of Thomas Hobbes, man's life in the so-called state of nature was "solitary, poor, nasty, brutish, and short." Hobbes, a contemporary of Locke, looked to absolute monarchy as the best guarantee against social disorganization and a return to barbarism. However, the common people of

England and later in France rejected this idea by overthrowing those monarchs who had pretensions to absolutism. It was John Locke who supplied the theoretical justification for these revolutionary steps and thus helped to prepare men's minds for a democratic society.

Locke's reasoning proceeds from the basic idea that men are "by nature . . . free, equal, and independent." But let the great philosopher speak for himself.

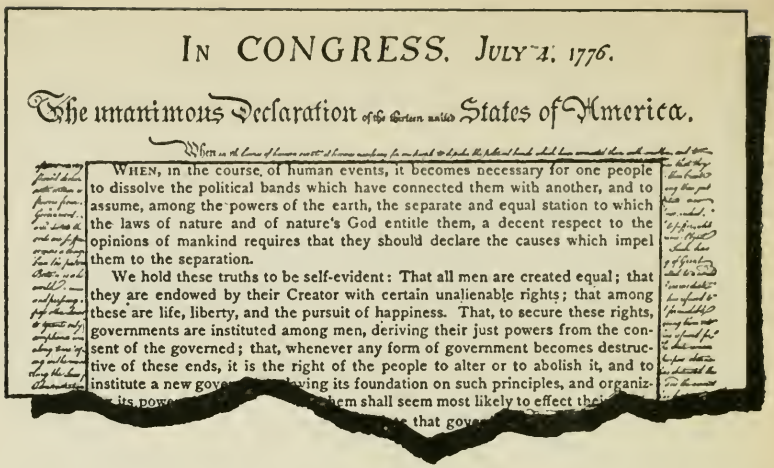
> "Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst others, in a secure enjoyment of their properties and a greater security against any that are not of it."

This is Locke's *social contract theory of government.* It implies inalienable rights, a "contract between governor and governed," the supremacy of the people, and the right of revolution under certain conditions. It is easy to see why the leaders of the American Revolution supported this theory, and why it has been appealed to again and again by men trying to assert their rights against tyrannical authority. Twentieth-century democracy is based, in large part, on Locke's concept of a government which exists to further the "comfortable, safe, and peaceable living" of the people. Twentieth-century totalitarianism, for all its fine talk of "discipline" and a "rational social order," marks a return to the law of tooth and claw.

The Declaration of Independence

It was inevitable that our Declaration of Independence should be worded in language that strongly suggests the influence of Locke. Compare the words below with the selection from Locke.

> "We hold these truths to be self-evident:—That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."



IN CONGRESS. JULY 4, 1776.

The unanimous Declaration of the thirteen united States of America.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new gov[illegible]ying its foundation on such principles, and organiz[illegible] its powe[illegible]hem shall seem most likely to effect thei[illegible]

[illegible] that gov[illegible]

These words were condemned at the time as "revolutionary propaganda." In the years since then, they have been dismissed more than once as "glittering generalities" without any concrete meaning or value. But the fact remains that the Declaration was the "birth certificate" of our nation and that it expresses the ideal of freedom in terms of unsurpassed clarity and eloquence. True, the conditions prevailing in the Colonies in 1776 did not square perfectly with the standards set up in this document. At that time, slavery existed, the suffrage was limited, and religious intolerance was widespread. But the Declaration was destined to point the way to the later democratic evolution of our nation. It has served as a blueprint for a society based firmly on human rights.

Our Living Constitution

We Americans are a constitution-minded people. Unimpressed by the British tradition of an unwritten constitution, the early American colonists began their political life with such written documents as the Mayflower Compact and the Fundamental Orders of Connecticut (the latter being the first written constitution in America). Between 1776 and 1876, more than 100 constitutions were adopted by the American people. Apparently, we prefer to set down our basic laws in black and white.

Originally, our Federal Constitution did not contain a bill of rights. True, Sections 9 and 10 of Article I contain references to bills of attainder, *ex post facto* laws, and writs of *habeas corpus*. The Founding Fathers, however, felt that, since the Federal gov-

ernment possessed limited powers only, there was no reason to fear an invasion of personal rights, and no need to guarantee these rights in so many words. Popular opinion, however, did not share this confidence, and the ratification of the Constitution by the states was accompanied by demands for a bill of rights.

The year 1791 saw the adoption of the first ten amendments to the Constitution—our Bill of Rights—a classic statement of the fundamental rights of man. Here we find enumerated the basic civil liberties, the forms of protection accorded a person accused of a crime, and the rights of property. The general tone of these amendments, as well as of the body of the Constitution, is one of *laissez-faire*. It reflects the dominant political philosophy of the time: "that government is best which governs least." The people are entitled to *freedom from* governmental restraints and restrictions.

Since the Bill of Rights limited only the powers of Congress the various state governments were left at first without restrictions in the field of human rights. However, bills of rights were incorporated eventually into all the state constitutions as a safeguard against oppressive actions.

Since the adoption of the Bill of Rights, twelve amendments have been added to the Constitution. These embody a number of provisions which represent substantial gains in the struggle for human rights. The most important, probably was the Fourteenth Amendment (an outgrowth of the Civil War), which in effect nationalized the Federal Bill of Rights.* It can be said, however, that progress has been made in this field not so much by constitutional amendment as by judicial decisions, by passage of laws, and, most important, by changes in public opinion and in the attitude of the community.

The Tyranny of the Majority

Human rights can exist only in a stable society. When the fabric of society is ripped apart, liberty degenerates into license and government breaks down into anarchy. Political stability is therefore essential to true liberty.

This indicates that in any searching study of human rights, two factors must be considered—the rights of the individual,

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*The Federal Bill of Rights limits only the powers of Congress. The Fourteenth Amendment protects the individual's freedom against *state action.* The word *liberty* as used in the Amendment includes freedom of speech, press, religion, assembly and petition, and any other rights specified in the first ten amendments which the Supreme Court decides to read into that word.

and the demands of the general welfare. The *general welfare* is concerned primarily with the basic institutions and interests that affect society as a whole. The *rights of the individual*, of course, relate to personal freedom, which may on occasion be more or less in conflict with the accepted concept of general welfare. Here is the key problem of every truly democratic government—how to prevent society (the majority) from riding roughshod over the individual, while at the same time recognizing that the individual must often give way before the needs and preferences of the large social unit to which he belongs.

The men at the Constitutional Convention of 1787 were keenly aware of this crucial issue. It is no secret that our Constitution was written and ratified by a minority of the total population. It does not detract from the greatness of our supreme law to admit that many of the Founding Fathers feared the tyranny of the propertyless majority and included provisions specifically aimed to protect the propertied minority. The separation of powers into three branches (executive, legislative, and judicial), the electoral college, the indirect election of Senators—all these devices were designed, in part, as a means of protecting the conservative minority against the possible "tyranny of the majority." In addition, the Federal Bill of Rights sought to prevent Congress (which was pre-eminently the instrument of the people as a whole) from invading the fundamental rights of minorities.

But the provisions of the Constitution for the protection of minorities go far beyond the mere safeguarding of property rights. Our basic law rests on the idea that the concept of freedom is meaningless unless it applies particularly to those critics, crusaders, and dissenters whose opinions are most obnoxious to the "respectable" majority. It is not surprising, therefore, that the Constitution has been invoked to help conservatives, liberals, and radicals in the *minority* withstand the pressure of the majority acting in the name of the general welfare.

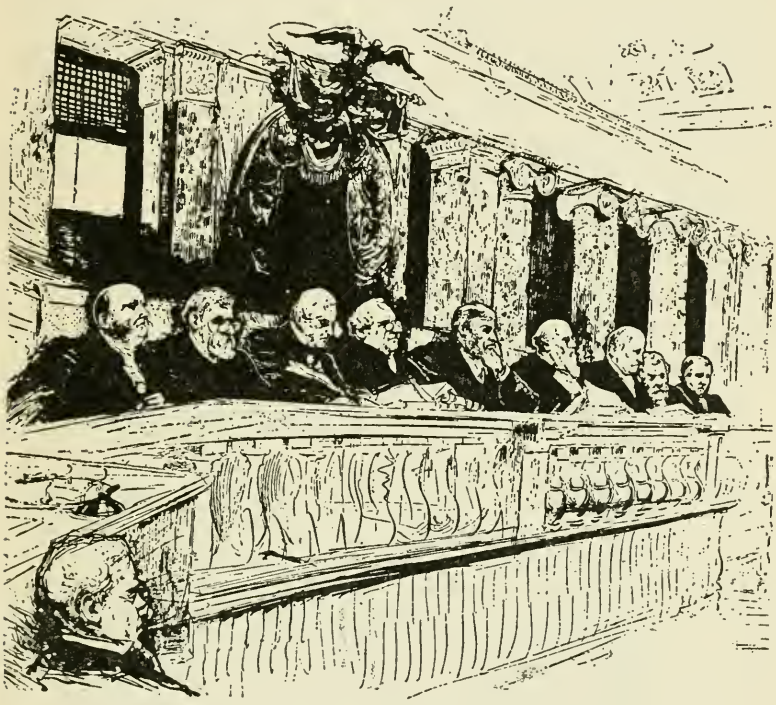
Thus, the American tradition is one of majority rule—but a majority rule which exercises self-restraint in its dealings with minorities. This, of course, is based, in part, on the realization that today's minority may become tomorrow's majority.

The Supreme Court—Supreme Arbiter

What agency in our country is authorized to decide when the majority is overstepping the proper bounds? How do we draw the line beyond which a militant minority is forbidden to

proceed? In England and France, these questions are settled by the law-making body (Parliament), which is supreme. In the United States, the final referee or umpire is the Supreme Court.

"I shall carry this case to the Supreme Court, if necessary!" This determined outcry on the part of many an aggrieved party indicates clearly the respect which the Court has won for itself in our society. Certainly, the Court is America's unique and outstanding contribution to the field of political science. This



The Supreme Court in session in 1882.

was evident more than a century ago to that keen observer of the American scene, Alexis de Tocqueville, who wrote in his *Democracy in America:* "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The passage of the years has enhanced, rather than restricted, the influence of this body. The Supreme Court has not only become the judge of important political issues, but also, in many cases, has shaped economic and social policy.

It was with John Marshall's decision in *Marbury v. Madison* (1803) that the Court assumed the role of judicial review—the power to rule on the constitutionality of Federal laws. Later, this was extended to state laws. In time, judicial review led inevitably to "judicial legislation"—thus elevating the Court to the position of supreme arbiter in all important constitutional issues.

The extraordinary powers of the Supreme Court have been vigorously criticized, and just as vigorously supported. It is relatively easy to make out a "case" against the Court by highlighting the Dred Scott decision and other decisions which tend to show that the Justices were preoccupied with defending the property rights of special groups, regardless of the impact of such rights on the public interest and on reasonable standards of social welfare. On the other hand, the Court is regarded by many as the outstanding defender of our liberties, and there is solid historical evidence to back up this view.

Certainly for most of us the nine Justices are the chief referee or umpire in the realm of human rights. Today, a decision of a majority of these men is considered the final pronouncement on a subject, unless the crucial nature of the issue leads to an amendment of the Constitution or compels the Court to reverse itself.

Limitations on Judicial Review

There are, however, certain important limitations on the doctrine of judicial review. In the first place, a case cannot reach the highest court unless it involves an issue of basic constitutional importance. And even in such cases, the Court may refuse a writ of *certiorari* (review). Second, to carry an issue all the way to the Supreme Court requires courage, energy, time, and *money*. This explains why many important cases are abandoned in the lower courts. Another point is that the Court is usually called upon to decide an issue long after the alleged violation of a law or infringement of someone's rights has taken place.

A final restriction on judicial power was well expressed by Finley Peter Dunne's famous character "Mr. Dooley," who sagely remarked that the Supreme Court follows the election returns. True, the Justices may not follow this year's election returns or even the returns of several years running—but eventually the Court does respond to public opinion. Although the personnel of the Court necessarily undergoes changes, it cannot, in the long run, be uninfluenced by the trend of the times as expressed by the thoughts, needs, and hopes of the people. Thus, in response

to changes in public opinion, the Court has reversed itself on such issues as minimum-wage laws, the all-White primaries, restrictive covenants for the sale of properties to Negroes and other minorities, and the refusal of a certain religious group to salute the flag. (We shall consider the attitude of the Court toward these issues in later chapters of this pamphlet.)

Our Ultimate Responsibility

If the Supreme Court eventually conforms to public opinion, then it is clear that the people—all the people—will determine the fate of human rights in this country. On this basis, common sense indicates that we cannot afford to "take liberties with liberty." Human rights impose grave responsibilities on all those who benefit from them. Vigilance is indeed the price of liberty—but it is not the whole price. We must also "pay" by studying and seeking to understand the nature and the exact scope of the

Herblock in the *Washington Post.*

UNCLE SAM: "How'm I doin'?"

freedoms we enjoy. Above all, we must attach the proper *value* to our liberties. The noted English writer, W. Somerset Maugham, has expressed this very well:

"If a nation values anything more than freedom, it will lose its freedom; and the irony of it is that if it is comfort or money that it values more, it will lose that too."

Many of us may feel that we need not worry too much about our rights because there are always the courts to protect our precious heritage. Professor Henry S. Commager has pointed out the danger of this type of hazy thinking.

"The tendency to decide issues of personal liberty in the judicial arena alone has the effect of dulling the people into apathy towards issues that are fundamentally their concern with the comforting notion that the courts will take care of personal and minority rights."

The courts *will* "take care" of our freedom—but only to the extent that they are backed up by a public opinion which is alert, informed, and firmly committed to the ideal of a full measure of human rights for all.

THINGS TO DO

1. Examine carefully *Heritage of Freedom*, by Frank Monaghan (Princeton University Press, 1947). This "Official Book of the Freedom Train" is an excellent collection of the basic documents of American freedom, with an interesting commentary on each document.

2. Obtain a copy of the March 12, 1951 issue of *Life Magazine*, in which you will find a fine collection of paintings, depicting memorable victories in the fight for justice. The commentary is by Federal Judge Jerome Frank. The paintings are suitable for display in class.

3. Obtain a copy of *A Catalogue of Selected Educational Recordings*, published by the Recordings Division of the New York University Film Library, Washington Square, New York 12, N. Y. On pages 13-17, you will find many recordings dealing with the history of democracy and civil liberties. Discuss with your teacher and class the possibility of purchasing some of these.

4. "Your right to swing your arm ends just where the other man's nose begins." Analyze the meaning of this maxim, showing how it applies to many everyday activities and situations.

5. Get acquainted with *Leading Constitutional Decisions*, by Robert E. Cushman (Appleton-Century-Crofts, 1947)—a fine collection of important Supreme Court cases with excellent explanatory notes.

6. Write a biography of one of the following for class presentation. (Consult the *Dictionary of American Biography* and other references.)

(*a*) A Supreme Court Justice whose decisions helped to clarify the meaning of human rights.

(*b*) A great American (other than judges) who played an outstanding role in the struggle for human rights.

CHAPTER 2

FREEDOM OF THOUGHT, BELIEF, AND EXPRESSION

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."
>
> —Supreme Court Justice Oliver Wendell Holmes, Jr.
> (Dissenting opinion in *Abrams v. United States,* 1919)

Our First Freedom

Freedom of thought, belief, and expression is properly called the "first freedom" because it is the basis of all the others. Despite some serious infringements, especially during colonial days, we Americans have in general enjoyed this freedom throughout our history. The basic reason is that this nation was "cradled in liberty," and grew to maturity without the restrictions and the traditions of censorship and "thought control" that characterized European societies.

The first freedom has been written into our Federal Constitution (First and Fourteenth Amendments) and into the constitutions of all the states.

Socrates Speaks

What arguments can we advance in favor of this basic freedom? We can say, first, that the end or ultimate purpose of our govern-

ment is the dignity of man, and that freedom of thought, belief, and expression is essential to man's dignity as a member of a civilized community. As a nation, we are dedicated to the ideals of democracy, and there can be no true democracy unless every individual has the right to form his own opinions and to express them freely. Finally, from a purely "practical" point of view, we can point out that the free and inquiring mind is the basis of all human progress. Any society in which men are afraid to think, or to tell other men what they think, will inevitably stagnate.

The classic statement in favor of our first freedom comes from ancient Athens. Socrates, the great teacher and philosopher, accused by the government of corrupting Athenian youth and of introducing new gods, is quoted by Plato as speaking these words in his own defense.

> "And now, Athenians, I am not going to argue for my own sake, as you may think, but for yours, that you may not sin against the God by condemning me, who am his gift to you. For if you kill me you will not easily find a successor to me, who, if I may use such a ludicrous figure of speech, am a sort of a gadfly, given to the State by God; and the State is a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life. I am that gadfly which God has attached to the State, and all day long and in all places am always fastening upon you, arousing and persuading and reproaching you. You will not easily find another like me, and therefore I would advise you to spare me.
>
> —Plato (*Apology*)

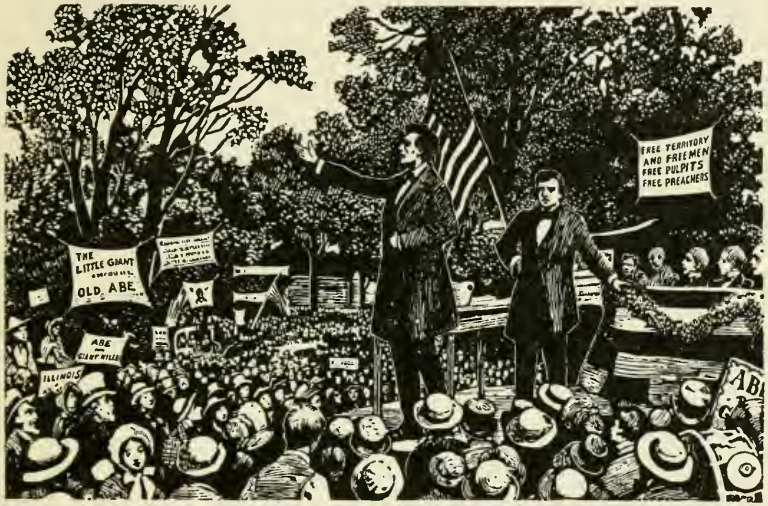
This magnificent statement is as valid and as revealing today as when it was first made, more than 2000 years ago. What Socrates is telling us is that society (*any* society) tends to be smug, sluggish, and set in its ways. It must be aroused—"stirred into life"—if constructive changes are to be made when necessary. This job of "stirring up" is the function of the "gadfly"—that is, the critic or dissenter. Of course, the "bite" of the gadfly is likely to be annoying. Some citizens will probably resent it and may even demand that the gadfly be squelched. But other citizens will be stimulated into thinking about conditions and proposals that otherwise might never have come to their attention. Ideas are exchanged, and ultimately a new trend of public opinion may develop. Then, the way is cleared for a change in our social and political institutions.

But remember that the gadfly can do his job only in a society which guarantees freedom of thought and the right to express those thoughts without hindrance.

"Get a Soapbox!"

Since we Americans don't care for "thought police," there has never been any serious threat to our freedom of thought. It is only when thought becomes *expression* that problems may arise.

Of course, when we express opinions in the intimacy of our homes or among close friends, our freedom is virtually unlimited. When opinions are expressed publicly, however, the situation is more complex. Then our freedom may have to be restricted somewhat in order to protect the rights of other people. For example, as



From a drawing in *Harper's Weekly* (T. F. Healy Collection)

This old woodcut shows a scene from the Lincoln-Douglas debates in 1858. Free discussion of all political issues is a basic American tradition. It is significant that in this debate Lincoln and the newly formed Republican Party represented an "unpopular," minority attitude toward slavery.

Supreme Court Justice Holmes once pointed out in a memorable statement, no one has the right, as a practical joke, to shout "Fire!" in a crowded theater. If we refer to someone as a thief, without being able to prove it, we may be sued for *slander* (if the statement is oral) or for *libel* (if it is written).

These are extreme cases, and therefore easy to decide. More difficult issues arise when an advocate of some cause or movement mounts a "soapbox" to address a street-corner meeting. The right to speak publicly in this way is unquestioned in the United States, but a speech which threatens public order and safety may be challenged by the law.

An interesting case of this type occurred in 1949, in Syracuse, New York. A college student addressed a street-corner meeting at which both Whites and Negroes were present. In his talk, he made remarks severely critical of President Truman, the mayor of the city, and other local public officials. The police received a complaint about the meeting, and two officers arrived on the scene. The speaker, according to the officers, gave the impression that he was trying to arouse the Negroes against the Whites, urging them to use force, if necessary, to secure their equal rights. The crowd, which overflowed into the street, grew restless; feelings became heated, and there was at least one threat of a fight. Because of these conditions, an officer asked the speaker three times to stop his speech. The speaker refused each time, and finally was placed under arrest, charged with disorderly conduct.

This case finally reached the Supreme Court as *Feiner v. New York* (1950). The Court decided that there had been no attempt to suppress the speaker's views. The arrest was motivated by "a proper concern for the preservation of order and the protection of the general welfare." Six of the nine Justices ruled that a state can interfere with a person making a speech on a public thoroughfare whenever there is a "clear and present danger of riot, disorder, interference with traffic upon the streets, or other immediate threat to public safety, peace, or order."

Three Justices (Black, Douglas, and Minton) dissented. They emphasized that it is the duty of the police to protect speakers expressing unpopular views, rather than to exercise censorship. They concluded that although the audience in the case under consideration had been unsympathetic and restless, there had been no evidence of imminent riot or other serious disorder.

Thus in this case we find six Justices ruling that concern for the general welfare outweighed the right to freedom of speech; while three justices felt that the alleged menace to the general welfare was not clear enough or serious enough to justify suppression of the speaker. This difference of opinion resulted basically from different interpretations of the facts in the case.

"Hire a Hall!"

Much the same principles apply when an attempt is made to gain supporters for a cause or party by speaking in a meeting place hired for the purpose, rather than on a street corner. Let us examine two interesting cases.

In *DeJonge v. Oregon* (1937), the defendant was accused of violating a state law forbidding public meetings by any group

which advocated the overthrow of the government through force or violence. The defendant, a member of the Communist Party, spoke at a meeting of that party called for the purpose of protesting certain incidents connected with a local strike. No evidence was presented to show any unlawful conduct or utterances at the meeting. Chief Justice Hughes, speaking for a unanimous Court, ruled that the defendant had been deprived of his right of free speech and assembly. The decision emphasized that the public meeting which led to the arrest had a lawful purpose. It is the right of any citizen to discuss the public issues of the day, in order to seek redress of grievances, even though most citizens may not agree that the "grievances" in question are real. The Court stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. . . . Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."

In *Terminiello v. Chicago* (1949), the Supreme Court had to deal with a case resulting from a meeting which was admittedly turbulent and disorderly. The meeting in question attracted an audience of about 800 people to an auditorium in Chicago, while another 1000 milled about outside. The main speaker delivered a scathing and inflammatory attack on certain racial and religious minorities which are well represented in the population of Chicago. The crowd outside grew restless and angry, and although there was a police guard present to maintain order, a number of disturbances occurred. The speaker, who was also the organizer of the meeting, was then arrested, charged with disorderly conduct in violating a city ordinance which forbids any "breach of peace."

The defendant was found guilty, and this verdict was upheld by the lower appeals courts. The Supreme Court, however, ruled by a 5-to-4 vote that the defendant's constitutional right of freedom of speech had been violated. Justice Douglas, speaking for the majority said:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-

conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

These two decisions would seem to indicate that the Court allows more latitude to speakers who "hire a hall" than to those who try to spread their ideas from the "soapbox." However, in any given decision of this type, many other factors may be involved, including the temper of the times, the attitudes of the individual Justices, and the exact circumstances of the case.

The "Clear and Present Danger" Rule

Human societies, like individuals, are motivated by the instinct of self-preservation. They will always react strongly to any attempt to overthrow them by force and violence. A government which lacks the power to do this cannot hope to survive.

Each of our forty-eight states is endowed with *police power*, which means that it has the right to do anything which is needed to protect the lives, health, morals, welfare and safety of the people. It is under this police power that the states may move to suppress actions which are considered dangerous to the public or to the government itself. In the Feiner Case as we have seen, the Supreme Court ruled that the city of Syracuse could use its police power to curtail the defendant's freedom of speech.

Although our Federal government is one of limited powers, it has ample authority to protect itself against violence, insurrection, or any threat to its continued stability. In this sense, the Federal government too exercises police power.

A basic constitutional question which has arisen many times is this: How can we draw a line between the individual's right to freedom of thought, belief, and expression and the community's need for order and stability, as expressed in its police power? When the two seem to conflict, which must give way?

In the case of *Schenck v. United States*(1919), Supreme Court Justice Holmes enunciated his famous "clear and present danger" rule. The defendant in this case had sent to newly drafted men (World War I) pamphlets which denounced conscription and urged resistance to it. He was indicted under the Federal Espionage Act and was convicted.

The Supreme Court unanimously upheld this conviction. In his decision Justice Holmes said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

OLIVER WENDELL HOLMES, JR.
(1841-1935)

This son of the famous poet served as an officer in the Union Army during the Civil War. Later he became a Professor of Law at Harvard University and a Justice of the Supreme Court of Massachusetts. In 1902, he was appointed to the United States Supreme Court and served until 1932. Justice Holmes' legal scholarship, broad human sympathies, and outstanding powers of expression made him one of the greatest figures in the history of the Court. His dissenting opinions on cases involving human rights became "classics," and many of his ideas were later adopted by a majority of the Court.

Under this rule, the Supreme Court has the final right to decide in any given instance whether there is a "clear and present danger" to the stability of the government and the safety of the people. If there is no such danger, then the individual's rights to express his opinions may not be limited by the Federal government, the states, or any of the subdivisions of the states. The decision of the Court in any particular case will depend upon the facts and the circumstances, and on the way in which the Justices interpret them. In the Feiner Case, the Supreme Court decided that there *was* a "clear and present danger," and the conviction was upheld; in the Terminiello Case, a majority of the Justices failed to recognize such a danger, and the conviction was reversed.

Freedom of the Press

Freedom of the press is one of the basic Anglo-American liberties. As early as 1644, John Milton published his *Areopagitica*—a signi-

ficant statement in favor of free speech, as opposed to parliamentary censorship. Almost 100 years later, John Peter Zenger, publisher of a newspaper known as the *New York Weekly Journal*, was charged with "false and scandalous libel" for criticizing the Royal Governor of New York. The jury's verdict in favor of Zenger was an historic victory for freedom of the press in this country. Gouv-

This old print shows the trial of Peter Zenger. The accused is at the right, while his attorney addresses the court.

erneur Morris realized the significance of this case when he described it as "the Morning star of that liberty which subsequently revolutionized America."

It must be understood that freedom of the press is not confined to newspapers and periodicals. As Chief Justice Hughes has pointed out:

> "It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Tom Paine and others in our own history abundantly attest. The press in its historic connotations comprehends every sort of publication which affords a vehicle of information and opinion."

Congressional control over the press rests on a number of statutes, such as the Alien Registration Act of 1940, which forbids

advocacy of the violent overthrow of the government. Congress can also use its power over the mails to bar publications which are indecent, fraudulent, or seditious. Of course, the states can interfere with the press to some extent under their police power. In most cases, the final decision as to the constitutionality of any law or action in this field (either by the Federal government or by the states) will rest with the Supreme Court's interpretation of the "clear and present danger" rule, or on the applicability of the principle of police power to the facts at issue.

Let us examine two interesting cases on this subject. In *Near v. Minnesota* (1931), the Court had to rule on the constitutionality of a Minnesota "gag law," which provided for the "padlocking" of any newspaper under an injunction (court order) if it printed "malicious, scandalous, and defamatory" matter. Such an injunction could be lifted only if a judge who had issued the order was convinced that the paper would "behave itself" in the future. In a 5-to-4 decision, the Court decided that the law in question was an unreasonable restriction of freedom of the press amounting to censorship. The Fourteenth Amendment forbids a state to deprive a person of his *liberty*—which includes freedom of speech and press—without due process of law. The Minnesota law was held to be an unwarranted interference with the newspaper's liberty.

In *Grosjean v. American Press Company* (1936) the Supreme Court was confronted by another attempt to curb the press. Huey Long, political boss of Louisiana, had pushed through the legislature a 2% tax on the gross receipts of newspapers having a circulation of more than 20,000 per week. The tax was aimed at the papers hostile to Long and his organization. The Court decided that this was an obvious abridgment of freedom of the press, and therefore a violation of the First and Fourteenth Amendments.

Free Speech and Free Streets

There is obviously a direct connection between freedom of speech and freedom of the streets. Street meetings, parades, use of sound trucks, and distribution of handbills—all these and other street activities are methods of expression designed to gain public support for some cause or point of view.

The right to use the streets is, of course, subject to restriction in the interests of the public welfare. City governments, under the police power, may impose reasonable regulations for the sake of cleanliness, public order, and traffic control.

On the other hand, experience has shown that sweeping regulations may sometimes be used as a means of curbing freedom of expression, particularly in relation to unpopular groups. The Supreme Court has shown little sympathy for ordinances which clearly lend themselves to such misuse. In one case, the Court declared void a municipal law which forbade the distribution of any printed material unless the distributor had first obtained the permission of the city manager (*Lovell v. Griffin*, 1938). Thirteen years later, in *Kunz v. New York* (1951), the Court re-emphasized the principle that a public official cannot be given unlimited power to grant or withhold permits for street meetings. Standards or rules must be stated so as to guide and limit the officials.

Similar principles apply to the use of sound trucks and loudspeakers in public places. The Court has invalidated ordinances which gave public officials sweeping powers to decide when and where such devices might be used. On the other hand, the Court has agreed that "the hours and places of public discussion can be regulated"—in other words, that officials may justifiably be given limited authority to protect the public comfort and convenience.

Labor unions have made extensive use of the streets for many years by using pickets to inform the public of their side of a labor dispute. The Supreme Court has upheld peaceful picketing as a form of freedom of expression.

The Rise of Religious Freedom in America

As we have already noted, many of the early colonists fled to the New World to escape religious persecution, but they were not always willing to grant religious freedom to others when they set up communities in America. By the time of the American Revolution, there was an established (official) church in most of the colonies. In the Southern colonies and in parts of New York, this was the Anglican Church (the Church of England); in New England, it was the Congregational Church. Persons who did not belong to the established church could not vote or hold public office, and might also suffer other disabilities. Members of the "irregular" sects, such as the Quakers (the Society of Friends) suffered severe persecution.

On the other hand, a strong tradition of religious freedom made its appearance early in the history of the American colonies. One of the first steps in this direction was the *Toleration Act*, passed by the provincial assembly of the Catholic colony of Maryland in 1649. This law provided that no professing Christian "shall be in any way troubled . . . for his religion." The colony of Rhode

Island, founded by Roger Williams, granted full religious freedom to all; and in Pennsylvania, under the leadership of William Penn, all believers in God were welcome. In the eighteenth century, other colonies liberalized their treatment of minority religious groups.

The American Revolution has been called "a movement for democracy in religion as well as in government." As the newly formed states wrote constitutions to replace their colonial charters, many of them "disestablished" the official churches and provided for the separation of church and state. The Statute of Religious Liberty of Virginia was written by no less a figure than Thomas Jefferson, who was then Governor of the state. The Ordinance of 1787 provided for religious liberty in the Northwest Territory, and the five great states ultimately carved out of this region carried on this guarantee into their constitutions.

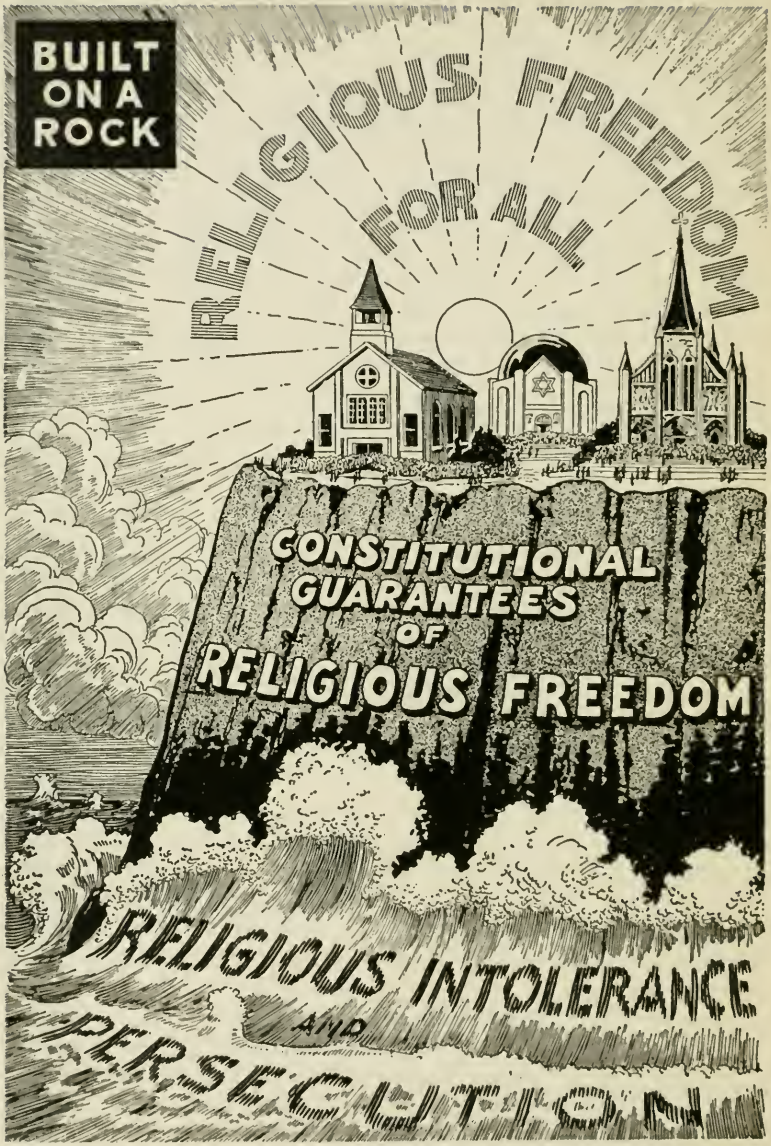
On the other hand, even after the Revolution a number of states continued in effect various constitutional provisions and statutes discriminating against certain minority religious groups. Such discriminatory clauses were not finally eliminated until well into the nineteenth century.

Constitutional Provisions for Religious Freedom

Our Constitution contains two provisions relating to religion. The *First Amendment* provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." *Article VI, clause 3* provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States." By judicial interpretation, the word "liberty" in the Fourteenth Amendment prohibits any state from interfering with the religious freedom of any person without due process of law.

Minority religious groups have had the most occasions to take advantage of this constitutional protection. On the whole religious freedom has been well safeguarded in the United States. However, this freedom, like all others, is not absolutely unlimited. One limiting factor has been the principle that acts which are otherwise illegal do not become lawful when they are performed in the name of religion.

One of the first important cases involving this principle arose in connection with the Mormons in the territory of Utah. Congress had outlawed polygamy (plural marriage) in this territory, but the Mormons persisted in practicing it because their religious teachings sanctioned it. The Supreme Court in a unanimous opinion ruled that the right to carry on religious practices does not


BUILT ON A ROCK
RELIGIOUS FREEDOM FOR ALL
CONSTITUTIONAL GUARANTEES OF RELIGIOUS FREEDOM
RELIGIOUS INTOLERANCE AND PERSECUTION

include the right to engage in acts deemed immoral or criminal by our law-making bodies. Since polygamy has been deemed "odious" by the customs and laws of Western nations, no group may practice it here, even though it is in accordance with their religious doctrines.

Pacifists and conscientious objectors have had their troubles with the Court, too. In *Hamilton v. Regents of University of California* (1934), the Court upheld the expulsion of a student from a state university on the ground that he had refused, in accordance with his religious convictions, to take a compulsory course in military training. In general, our courts have refused to intercede on behalf of conscientious objectors who refuse to render active military service. The armed forces, however, have usually made special allowances for members of recognized religious sects which forbid killing, even in line of military duty. This applies, for example, to the Society of Friends (Quakers).

Jehovah's Witnesses

The sect known as Jehovah's Witnesses has done more than any other religious group to present to the Supreme Court certain basic questions concerning the nature of religious freedom. Professor Cushman has estimated that between 1938 and 1946, the Witnesses brought twenty major cases before the Court and were victorious in fourteen. In this way, they have not only forced the clarification of certain issues but in at least two instances have led the Court to reverse itself.

The more famous of these reversals were the two *Flag Salute Cases*. Both cases dealt with the right of a school board to expel children because they refused to salute the flag of the United States. This refusal was based on religious grounds, and the parents of the children contended that punishment for such an attitude was an unconstitutional restriction of their freedom of religion. In the *Gobitis Case* (1940) the Court, with one Justice dissenting, ruled that the expulsion was constitutional on the grounds that "national unity is the basis of national security," and that "the ultimate foundation of a free society is the binding tie of cohesive sentiment." Justice Frankfurter pointed out that religious freedom, like all our freedoms, is not absolute but must be qualified or restricted by other considerations, such as national unity and national security.

A writer on this subject, in studying the public reaction to the Gobitis decision, concluded that 171 leading newspapers condemned the Court's ruling and that only three or four approved of it. This strong public reaction may have played a part in induc-

ing the Court to overrule the Gobitis decision, three years later, in *West Virginia Board of Education v. Barnette*. Justice Jackson, speaking for a majority of six, made the following statement:

> "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth in embracing. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.
>
> "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."

In the case of *Cantwell v. Connecticut* (1940), the Supreme Court again supported the Witnesses on two grounds. The Court ruled invalid a statute of Connecticut which required a permit for the solicitation of funds for religious causes, and which gave a state official the right to determine whether or not a particular cause was truly "religious." The decision held that such a statute was a "censorship of religion as a means of determining its right to survive." In this sense, the statute was a denial of religious freedom, without due process of law. In the same case the Court set aside the conviction of one of the Witnesses who had been charged with disorderly conduct as a result of playing phonograph records on the street. The records in question dealt with religious matters and were personally offensive to other citizens, but the Court held that the right to express religious convictions in this way falls within the constitutional guarantees of religious liberty.

Educational Liberty and Religious Freedom

Under our Constitution, the forty-eight states have the authority to enact laws dealing with education. On various occasions, such laws have come into conflict with the rights claimed by a religious group under the First and Fourteenth Amendments.

In the 1920's, Oregon passed a law which required all children between the ages of eight and sixteen to attend *public* schools. This law, obviously, aimed at destroying all private schools in the state, including those maintained by religious bodies. In the case of *Pierce v. Society of Sisters* (1925), the Supreme Court declared this law unconstitutional on the grounds that it violated

the provision of the Fourteenth Amendment which forbids a state to deprive any person of his liberty without due process of law. Justice McReynolds, speaking for the Court, held that the Oregon statute interfered unreasonably with "the liberty of parents and guardians to direct the upbringing and education of children under their control."

We have already seen that in the Flag Salute Cases, involving Jehovah's Witnesses, the Supreme Court finally decided that the right to religious freedom, as protected by the First and Fourteenth Amendments, takes precedence over compulsory patriotic ceremonies conducted in the public schools (*West Virginia Board of Education v. Barnette*, 1943).

In 1947, the Court dealt with the interesting and significant case of *Everson v. Board of Education*. A New Jersey town, acting under a state law, reimbursed parents for the bus fares they had spent to send their children to school. This included parents whose children were attending Catholic parochial schools. Everson, a resident of the town, argued against this practice, on the grounds that payments to parents of parochial school pupils amounted to state support of religious schools. He contended that the First Amendment provides for the complete separation of church and state in Federal affairs, and that the Fourteenth Amendment continues this wall of separation on the state level. The Court's decision was a close one. Five Justices decided that the town had the right to reimburse the parents of parochial school students because this did not constitute direct aid to a religious institution. It was merely part of a general plan to aid education. Four Justices dissented sharply, arguing that the separation of church and state implied by the First Amendment necessarily forbids any state support—financial or non-financial, direct or indirect—for a religious institution.

In 1948, the Supreme Court was confronted with a perplexing problem in the case of *McCullom v. Board of Education*. This involved the "released time" program of religious instruction in the public schools of Champaign, Illinois. (Under this program, children were "released" from regular classes to attend classes of religious instruction in their own faith. The public school classrooms were used for the purpose.) Eight of the nine Justices decided that this program was a violation of the principle of separation of church and state, as embodied in the First Amendment and incorporated into the Fourteenth Amendment. Justice Black emphasized the opposition of the Court to any attempt to utilize "the tax-established and tax-supported public school system to aid religions to spread their faith."

Justice Reed, in his dissent, stated that a "friendly gesture" between church and state is not prohibited by the Constitution, and that the granting of some public aid to religion is one of the "accepted habits of our people" (for example, tax exemptions).

Other programs of released time for religious instruction have been set up which are designed to avoid constitutional infringement. Cases involving this issue, as well as the question of public aid to parochial schools, will undoubtedly come before the Court within the next few years. Follow these cases carefully to determine what rules the Court will formulate in this vital field of educational liberty and religious freedom.

THINGS TO DO

1. Set up a class bulletin board on human rights. Under the heading of *PLUS* place clippings dealing with victories or advances for human rights. Under the heading of *MINUS*, place clippings that tell of cases in which human rights have been restricted or invaded. A class committee should be chosen to take charge of this board.

2. Form a class committee of five to read different chapters in *The First Freedom*, by Morris Ernst (Macmillan, 1946). This committee should then hold a round-table discussion before the class on the growing trend toward monopoly in mass-communication media, including newspapers, moving pictures, and radio-television. The solution to this problem, as suggested by Mr. Ernst, should be analyzed. Allow time for questions.

3. Write to the National Association of Manufacturers and to the American Federation of Labor for pamphlets and other material which they issue on the Taft-Hartley Act. Compare the points of view expressed. What is the significance of this with regard to the ideas developed in the present chapter? (You may send your requests to the local offices of these two organizations, as given in telephone books. If there is no local office, use the following addresses: AFL—1440 Broadway, New York 18, N. Y.; NAM—14 West 49 Street, New York 20, N. Y.)

4. Suggest to your teacher a showing of the film strip entitled *Freedom of the Press*. This may be obtained from the New York *Times*, 229 West 43 St., New York 19, N. Y.

5. Your class will undoubtedly enjoy the film entitled *The House I Live In*, with Frank Sinatra. (It may be rented or purchased from Film Program Services, Inc., 1173 Avenue of the Americas, New York 19, N. Y.) This moving picture teaches a memorable lesson regarding the meaning and value of religious freedom.

6. Discuss with your friends or in class the following statement by Oliver Wendell Holmes, Jr.: "If there is any principle of the Constitution that more imperatively calls for attachment, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate."

CHAPTER 3

RIGHTS OF AN ACCUSED PERSON

> "The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake, and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless."
>
> —Supreme Court Justice Hugo L. Black (*Chambers v. Florida*, 1940)

Democratic State Versus Police State

In the cold war being waged between the totalitarian nations and the democratic world, one of our greatest assets is our tradition of human rights, especially in the field of criminal law. It is in this very respect that the superiority of a democracy is most obvious and irrefutable. The moral advantage which this gives us, in our own eyes and in the eyes of the world, is a weapon as formidable, in the long run, as economic or military power.

Lawbreakers are a danger to society, and must be detected, caught, tried, and convicted with the greatest possible speed and efficiency. Our problem, however, is not merely to achieve these ends, but to achieve them without violating the rights of the innocent. Experience has shown that many innocent people fall under suspicion and come within the grasp of the law.

Here again we meet the age-old problem of how society can respect the rights and dignity of each individual and, at the same time, meet the need for public security and safety. Totalitarian states emphasize the security of the government at all costs. They depend on a powerful political police force, entrusted with the all-important job of ferreting out persons who may be considered

dangerous to the state. This category of "dangerous" is broad enough to include anyone who dares even to criticize the regime in power or the doctrines on which it is based. Laws are often written in vague terms, and mere suspicion of "disloyalty" may lead to detention and trial. The rights of an accused person at trial are virtually non-existent, and conviction is almost a certainty if the authorities want to "put away" someone whom they distrust or dislike.

On the other hand, in wrestling with the problem of police efficiency (or public security) versus individual liberty, we Americans have always strongly emphasized the rights of accused parties. This may not be so in every case, but in general we have stood by the tradition of considering a man innocent until proven guilty in a fair trial. This tradition is well expressed by that important and elastic phrase—*due process of law.*

Due Process of Law

We say that due process of law is an "elastic" concept because it can be, and has been, stretched to cover a wide variety of situations and to serve many different purposes. Its most important application, however, has been as a shield to protect the innocent and to insure a fair deal to anyone who becomes involved with the law.

Historically, this expression goes back to *Magna Carta,* which spoke of the "law of the land." As Professor Edward S. Corwin, an eminent authority on constitutional law, has pointed out, the phrase originally referred to the methods or standards of procedure which were *due,* under the common law, to an accused person in any criminal case. It probably comprised all the safeguards embodied in the Fifth and Sixth Amendments to our Constitution. Today, due process of law has come to mean in criminal cases reasonable procedures or fair treatment of an accused, according to the rules and standards of a democratic society.

A person tried for a crime who feels that he has been deprived of due process can appeal to the higher courts. The ultimate authority in deciding such an issue is, of course, the Supreme Court.

"A Man's Home Is His Castle"

One of the main grievances of the American colonists against England in the years just before the Revolution was the issuance of *writs of assistance.* These were general search warrants which empowered officers to search any place at any time for smuggled

goods. James Otis, in his public opposition to such writs, stated: "That places the liberty of every man in the hands of every petty officer." The colonists firmly believed in the ancient principle of the English common law that "A man's home is his castle." Accordingly, when independence was won, the people insisted on the inclusion of a suitable guarantee to this effect in the Bill of Rights. This was done in the Fourth Amendment, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Note that there must be a warrant which describes specifically the place to be searched and the persons or things to be seized. Observe, also, that the warrants must be supported by an oath or affirmation stating that there is "probable cause" that the evidence being sought relates to a criminal act. All these safeguards are designed to prevent mere "fishing expeditions," based on vague suspicions or perhaps on malice, which would violate a person's right to security and privacy.

Obviously, police officers must have the right to make an arrest without a warrant when there is good reason to believe that a crime has been, or is being, committed. For example, when a policeman sees someone burglarizing a house, his duty is to take immediate action. Also, in such circumstances, police have the right to search persons suspected of a crime, as well as the premises where the crime has been committed.

The case of *United States v. Rabinowitz* (1950) gives us an insight into the complications involved in applying the rule against unreasonable searches and seizures. The defendant was convicted of possessing, concealing, and selling forged and altered postage stamps. After the defendant had sold four of these stamps to a government agent, a warrant was issued for his arrest, but the officers failed to obtain a search warrant for his place of business. The arrest was made at this place of business, where the officers, over the defendant's objection, proceeded to search his desk, safe, and file cabinets. Several hundred forged stamps were seized in this way. The defendant was then indicted and convicted on two counts—selling four forged stamps, and possessing and concealing several hundred forged stamps. The defendant claimed that the evidence relating to the seized stamps should have been excluded because the search was made without a proper warrant, although the officers had had plenty of time to secure one.

A majority of the Supreme Court ruled that the search in this case was a lawful one. Some time previous, the case of *Trupiano v. United States* (1948) had established the principle that search warrants must be obtained, whenever practicable, in a search incident to an arrest. This precedent, the Court held in *United States v. Rabinowitz*, is now overruled. The new test is not whether it is practicable to obtain a warrant, but rather whether the search itself is a reasonable procedure under the circumstances.

Justices Frankfurter, Jackson, and Black dissented sharply in this case, emphasizing that the right of privacy is sacred and that the constitutional guarantees of this right must be upheld.

Wiretapping—An Invasion of Privacy?

In general, a man's private books and papers cannot be used as evidence against him in any criminal proceeding. Does this also apply to telephone conversations? Can such conversations be tapped without the speaker's knowledge or consent, and then be used lawfully as evidence to convict him? This issue has become a legal problem of considerable significance in recent years.

The case of *Olmstead v. United States* (1928) presented this issue clearly to the Supreme Court. The only evidence in this trial consisted of several hundred pages of a stenographic record of tapped telephone conversations among the defendants. The defense maintained that the evidence was illegal since it had been obtained by "unreasonable search and seizure," in violation of the Fourth Amendment. Also, it was argued, this evidence violated the Fifth Amendment, which prohibits compulsory self-incrimination. In a 5-to-4 decision, the Supreme Court decided that wiretapping is not forbidden by the Fourth Amendment. Since no physical property had been taken from the defendants, there had been no "search and seizure." Furthermore, the defendants had not been compelled to talk over the telephone, so that the element of compulsory self-incrimination was not involved.

In 1934, Congress passed the Federal Communications Act, which contains the following provision:

> "... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, or substance ... of such intercepted communication to any person."

The Supreme Court ruled that this law made wiretapping *by Federal officers* illegal.

The Bill of Rights of the New York Constitution contains the following restriction on wiretapping:

"The right of the people to be secure against unreasonable interception of telephone and telegraph communication shall not be violated, and ex parte orders or warrants shall issue (that is, shall be issued by judges) only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

Despite such Federal and state restrictions on wiretapping, anyone who reads the newspapers or is familiar with the proceedings of crime investigations must be aware that this practice continues on a local and an interstate basis. There is a serious legal issue involved here which, sooner or later, must be definitely settled by new legislation, court decisions, or both.

Protection Against Self-Incrimination

A significant clause in the Fifth Amendment reads as follows: "... no person shall be compelled in any criminal case to be a witness against himself." This guarantees many important advantages for an accused person. It protects him from answering questions which might result in his indictment and prosecution. It means that the state must get its evidence from sources other than the accused himself. It indicates that the accused need not take the witness stand, unless he chooses freely to do so. And if he does take the stand, he need not answer any questions which might furnish incriminating evidence against himself. Obviously, the aim of these guarantees is to surround an accused with all the presumptions of innocence, and to place the burden of proving the charges on the state.

In the case of *Blau v. United States* (1950), we find the problem of self-incrimination clearly presented. Mrs. Blau was subpoenaed to appear before the United States Grand Jury to answer questions concerning the Communist Party of Colorado and her employment by it. She refused to answer on the grounds that her statements might tend to incriminate her. She was taken before the district judge, and the same questions were asked. Once again she refused to answer on the ground that the Fifth Amendment gave her a constitutional privilege against self-incrimination. The judge thereupon found her guilty of contempt and sentenced her to one year's imprisonment.

The case was appealed to the Supreme Court. In a unanimous decision (one Justice did not take part), the Court decided that Mrs. Blau had a right to refuse to testify about her relations with

the Communist Party. The Smith Act of 1940 makes it a crime to advocate knowingly the overthrow of the government by force or violence; to organize any society or group which teaches, advocates, or encourages such overthrow of the government; or to become a member of such group with knowledge of its purposes. In view of this, said the Court, Mrs. Blau had good reason to fear that her answers to the questions asked might lead to criminal action against her. Under such circumstances, a witness may invoke the Fifth Amendment and has "the privilege of remaining silent."

It should be borne in mind that an accused person or a witness cannot refuse to testify simply because his answers might be embarrassing, discreditable, or otherwise disadvantageous to him. The immunity can be based only on a *plausible fear of criminal prosecution*. This was dramatically illustrated in 1951, when a number of witnesses who had refused to answer questions put to them by the Kefauver Crime Investigation Committee were indicted for contempt of the United States Senate. A non-responsive witness in court may be punished for contempt of court if the judge feels that there is no element of self-incrimination involved.

The Third Degree

The Fifth Amendment also prohibits by implication the use of the third degree. This term refers to police methods involving some form of physical violence or brutality to force an accused party to confess to a crime. Obviously, such methods violate the constitutional guarantee which protects every American from being a witness against himself. Since the Fourteenth Amendment forbids a state to deprive any person of his liberty without due process of law, victims of the third degree in various states have often appealed successfully to the Supreme Court to have their convictions set aside.

A recent case involving these principles is *Haley v. Ohio* (1948). A fifteen-year-old Negro boy in Ohio was charged with murder. Arrested on a Friday night, he was questioned by relays of police officers from midnight to 5 A.M. Kept in jail for three days without being permitted to see his family or counsel, he finally confessed and was arraigned. In its decision, the Supreme Court stated that the accused had been a victim of coercion and inquisition. No young boy, guilty or innocent, could be expected to withstand such an ordeal. By denying the accused the advice and support of his family, friends, and lawyer, the police authorities had deprived him of due process of law. The Court's position can be summarized in this sentence: "The rack and torture chamber may not be substituted for the witness stand."

A Jury Trial in Federal Prosecutions

We generally associate a fair trial with a twelve-man jury chosen from the community in which the trial is held. These twelve men are the "peers," (that is, the equals) of the accused, and we expect them to be willing and able to do justice in the case before them. Under the Sixth Amendment, the accused in a *Federal* prosecution is entitled to a trial by jury.

Probably the best statement on this fundamental Anglo-American principle was made by the late Supreme Court Justice Frank Murphy in 1946.

> "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community; . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

All this seems rather simple in theory. A jury should represent a cross-section of the community, and no one should be excluded because of racial or religious reasons. In addition, jurors should have no prior prejudice either for or against the defendant.

However, what is simple in theory may turn out to be difficult in practice. This is illustrated by the case of *United States v. Dennis* (1950). The problem which confronted the Court may be summed up as follows: Can government employees serve as impartial jurors in a case which involves, directly or indirectly, the loyalty of a defendant to the United States? Eugene Dennis, Secretary-General of the Communist Party in the United States, had been convicted in the District of Columbia of wilfully failing to appear before the Committee on Un-American Activities of the House of Representatives, in compliance with a subpoena duly served upon him. At the trial Dennis protested that it was impossible for him, as a Communist, to obtain a fair and impartial trial in the District of Columbia because, unless special precautions were taken, the jury would inevitably include a large proportion of government employees. When the motion for transfer of trial was denied, the defendant's lawyer challenged all government employees called for jury service, on the ground that they could not render an impartial verdict. It was argued that the President's Loyalty Order (Executive Order 9835), providing for the investigations of Federal employees and the dismissal of those found to be disloyal, had created such an atmosphere of intimidation and fear that it was unlikely that any civil service worker would have the courage to vote for acquittal. Such a vote, the defense maintained, might well be interpreted as evidence of sympathy with Communism, and thus would expose the individual concerned to the stigma of disloyalty and to loss of his job. In spite of this argument, seven of the jurors finally selected were government employees. They had testified that the loyalty order and their status as civil service workers would not interfere with their rendering a just verdict.

When this case was brought to the Supreme Court, a majority of the Justices dismissed the defendant's contention that he had been denied a fair trial by an impartial jury, as guaranteed in the Sixth Amendment. The Court stated that government employees, merely on the basis of their employment, cannot be assumed to be biased, and should not be automatically barred from jury service in cases of this type. Since there was no proof of actual bias among the jurors, and since the government employees in question had stated under oath that they would hand down an honest verdict, the defendant's conviction was upheld.

A Fair Trial in State Courts

We have seen that the accused in a criminal case in the Federal courts is entitled to a jury trial, according to the guarantees of the Bill of Rights. Does this same right apply to defendants in criminal cases in the state courts?

Each state has its own constitutional provisions and laws relating to jury trials. In some states, jury trials are not available to defendants in certain types of criminal cases. As a matter of fact the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to mean that a defendant in a state court must get a fair trial, but not necessarily a jury trial. A trial held before a judge without a jury may, of course, be a "fair" one.

Where the state law provides for a jury trial, the jury must meet the standards described by Justice Frank Murphy in the previous section. States must not discriminate against prospective jurors because of their race, religion, or economic status. Some states have systematically discriminated against Negro jurors, but the Supreme Court has stepped in to halt this unlawful practice (page 72).

An interesting case arose recently concerning the so-called "blue ribbon" juries in New York State. In certain cases of particular importance or difficulty, an attempt is made to impanel a jury of better-than-average intelligence and moral responsibility. In practice, such a "blue-ribbon" jury is likely to consist largely of citizens from the upper-income levels, including professional men, business executives, etc. A defendant convicted by such a jury in a New York court appealed on the ground that he had not been tried by a "jury of his peers." The "blue-ribbon" principle, it was argued, made it impossible to select a true cross-section of the community and substantially reduced the defendant's chances of an acquittal. The Supreme Court decided that the methods used to select the "blue-ribbon" jury did not violate the defendant's right to a fair trial. However, four Justices voted to void the conviction.

The protection of the due process clause goes beyond the fair selection of a jury. A trial may be considered unfair, for example, if it is based on a confession obtained by the third degree, or if it is held under the influence of an unruly mob.

The Right to Assistance of Counsel

The Sixth Amendment requires the Federal government in all criminal prosecutions to furnish the accused with a lawyer for his defense, if he cannot afford to engage one. This, of course, is essential if all our citizens, rich and poor, are to enjoy equal justice

under the law. An accused man who is not represented by a lawyer does not have a fair chance to prove his innocence, or at least to explain the circumstances of the crime.

Although the right to counsel is absolute in all Federal courts, the situation in state courts is not clear, and practices vary considerably from state to state. In some states, the law requires only that the accused be represented by counsel, but does not set any standards which must be met if due process is to be satisfied. This situation is well illustrated in the famous *Scottsboro Case* (1932). Although the accused were on trial for their lives in an Alabama court, the judge did not assign counsel to them (as required by the Alabama Constitution) until the day of the trial. On appeal to the Supreme Court, the verdict of guilty was overthrown. Justice Sutherland's opinion is worth quoting:

> "In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process. . . ."

The Court, however, has limited the rule here stated to the circumstances of this particular case, and has refused to read the *absolute* right to counsel into the due process clause of the Fourteenth Amendment. The rule today, therefore, is that an accused person who has been denied adequate assistance of counsel in a state court cannot automatically win a reversal of his conviction on this ground alone. He must be able to prove that the denial really harmed him seriously in the conduct of the trial.

Double Jeopardy

One of the provisions of the Fifth Amendment is " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The need for such a guarantee is obvious. Once a person is tried for an offense and is found innocent, that should be the end of the matter. Otherwise, a cloud of suspicion and uncertainty might hang over him indefinitely. Most state constitutions include a similar safeguard for accused persons.

Once a jury has acquitted a man, the Federal government cannot appeal the case to a higher court. The same is true of those states which have this protection against double jeopardy. Of course, if

the defendant is found guilty, he can appeal in the hope that the verdict will be reversed or that he will get a new trial.

It is possible, however, for a man to be tried twice for the same crime since persons living in the United States are subject to both Federal and state jurisdiction. The case of *United States v. Lanza* (1922) illustrates this. Convicted in the state of Washington for violating the state liquor law, Lanza was sentenced to pay a fine. Subsequently, he was arrested for the same offense by the Federal government and tried for violating the Federal Volstead Act, which prohibited the possession, manufacture, or transportation of intoxicating liquors. Both the state and the Federal laws were passed to carry out the Eighteenth (Prohibition) Amendment. Lanza claimed that this was a case of double jeopardy, since he was being tried twice for the same offense.

The Supreme Court ruled that an act denounced as a crime by both the Federal government and a state government is a crime against the "peace and dignity" of both, and therefore may be punished by both. The double jeopardy rule does not apply to such situations.

Another unusual case involving double jeopardy is the spine-chilling story of Willie Francis. Sentenced to death in a Louisiana court, he was placed in the electric chair, but because of mechanical reasons the device failed to work. It was argued that to attempt to execute him a second time would constitute double jeopardy to life and limb, cruel and unusual punishment, and a denial of due process of law. In a 5-to-4 decision (1946), the Supreme Court ruled that Louisiana could try to execute him a second time. The minority ruled that this would be cruel and unusual punishment, and therefore was unconstitutional.

On the basis of these cases, we may conclude that the immunity against double jeopardy means only that (with very few exceptions) a person cannot be tried twice for *the same crime by the same government.*

Conclusion

All of the cases we have described briefly in this chapter are concerned fundamentally with the same issue. In general terms, this is: How are we to arrive at a fair balance between the need of *society* for efficient police protection and certain punishment of criminals, and the right of the *individual* to personal liberty, privacy, and justice?

It is obvious that there is no simple or easy formula that can be applied to this important problem. Under present-day national and world conditions, however, it appears that there is a need for

our courts to be particularly vigilant to protect the rights of the individual. Supreme Court Justice Hugo L. Black has some memorable advice in his opinion in *Chambers v. Florida* (1940).

> ". . . all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

THINGS TO DO

1. Ask your teacher to arrange a trip to a local court in order to see a criminal trial in process. After the trial discuss the following topics with your classmates: (*a*) Were the rights of the accused respected? (*b*) Was justice served in this case?

2. Do you have a student court in your school? If so, compare the procedure used with the "due process of law" procedure in our state and Federal courts. What suggestions can you make for the improvement of your student court?

3. Hold a class debate on the following topic: *Resolved*—That all wiretapping by Federal, state, and local officials should be outlawed.

4. An excellent film dramatizing the basic ideas expressed in this chapter is *Due Process of Law Denied* (an excerpt from the famous *Ox-Bow Incident*). It may be obtained from Columbia University Educational Films, 413 West 117 St., New York 27, N. Y. Suggest to your teacher that this film be shown to the class.

5. Draw up a list of the various ways in which the treatment of an accused person in the United States differs from the treatment accorded in a totalitarian country. How do you account for these differences?

6. Obtain a copy of the *Universal Declaration of Human Rights*, drawn up by the Economic and Social Council of the United Nations. (Write to the United Nations Secretariat, Information Bureau, New York, N. Y.) Which of the rights of an accused person enumerated in this document are also a part of the American tradition of human rights?

7. Judge Learned Hand of the United States Circuit Court has referred to due process of law as similar to "the English sporting idea of fair play." Do you think this comparison is an apt one? Does it help to clarify your own understanding of due process of law?

CHAPTER 4

THE RIGHT TO PROPERTY

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . "
>
> —Supreme Court Justice Owen J. Roberts
> (*Nebbia v. New York*, 1934)

Property and the Pursuit of Happiness

Two basic human rights which are mentioned in both the Declaration of Independence and the Federal Constitution are *life* and *liberty*. The Declaration, in addition, speaks of the "unalienable right" to the *pursuit of happiness*, whereas the Constitution refers to the right to *property*. It is reasonable to conclude from this, and from other evidence, that the Founding Fathers regarded the holding of property as an essential phase of the "pursuit of happiness."

To John Locke and to the American thinkers who were influenced by him, property was a "natural right" of man. Private ownership of property was something taken for granted. Locke at times used the term *property* to include both *life* and *liberty*, and emphasized that the chief purpose of government was the protection of these three rights. The importance attached to private property in colonial America is clearly evident in the property qualifications set for voting and for office-holding.

The right to property has different meanings for different people. To many of us, it still suggests the right to own a home, a farm, or a small business. With the industrialization of our coun-

try, it has come to signify the right to invest in the stocks and bonds of great corporations. The patenting of an invention and the copyrighting of a book or a song are other aspects of property. Almost all of us, rich and poor alike, are concerned with the right to accumulate money and to be secure in these savings. Finally, there is the right to use property so as to accumulate more property. This last has been particularly important in the United States, with its continually expanding economy and its "Horatio Alger" tradition of young men rising from poverty to great wealth. It is precisely this which many Americans have in mind when they speak of the "pursuit of happiness."

But the right to property, like the right to life and liberty, is not absolute. It must be weighed against the general welfare, and at times the individual's freedom of action must be restricted.

In this chapter, we shall examine three general ways in which the government has had to limit or control the rights of property in order to protect the interests of society as a whole. These include:

1. The enforcement of competition in the business world.
2. Social legislation (laws regulating hours of employment, working conditions, wages, etc.).
3. Regulation of business enterprises known as *public utilities.*

Competition and Laissez-Faire

A fundamental American principle has been the belief in free competition. Free competition implies that producers have the right to make whatever goods they wish and to sell them at whatever prices they can obtain. Similarly, consumers are permitted to buy whatever they wish, at the most advantageous prices they can find. Under such conditions, there will normally be many sellers trying to attract purchasers and many purchasers eager to obtain goods. Thus, prices will be "self-regulating," and the quality of goods will be kept relatively high.

This theory of competition—free rivalry among buyers and sellers in an open market—was accompanied for many years by a belief in *laissez-faire.* This French phrase means simply that the government ought not to attempt to control our economic affairs. In other words, a free competitive economy should be allowed to regulate itself. Government intervention, according to the doctrine of *laissez-faire,* should be limited to the very minimum required by public welfare.

Now, let us apply this theory of competition to a simple story that occurred more than 40 years ago in Minnesota.

The Barber and the Banker

A barber in a small town in Minnesota was earning a comfortable living when, for one reason or another, he antagonized the local banker, a wealthy man of great power in the community. The banker decided to drive the barber out of business by setting up a barber shop of his own. After doing this, the banker began to use his influence to induce the barber's customers to patronize the new shop. He went so far as to threaten financial reprisals against various individuals if they did not do as he demanded. All these actions were taken in order to drive the barber out of business.

The barber thereupon sued the banker for $10,000 in damages for injuring his business. The banker answered that our economic system is a competitive one, and that a man has a right to engage in any lawful business and to attempt to take away the customers of anyone else in that field.

The issue finally came before the highest court of Minnesota as the famous case of *Tuttle v. Buck* (1909). The court ruled in favor of the barber, emphasizing that the right to compete does not justify a man in starting "an opposition place of business, not for the sake of profit to himself, but for the sole purpose of driving his competitor out of business. . . . "

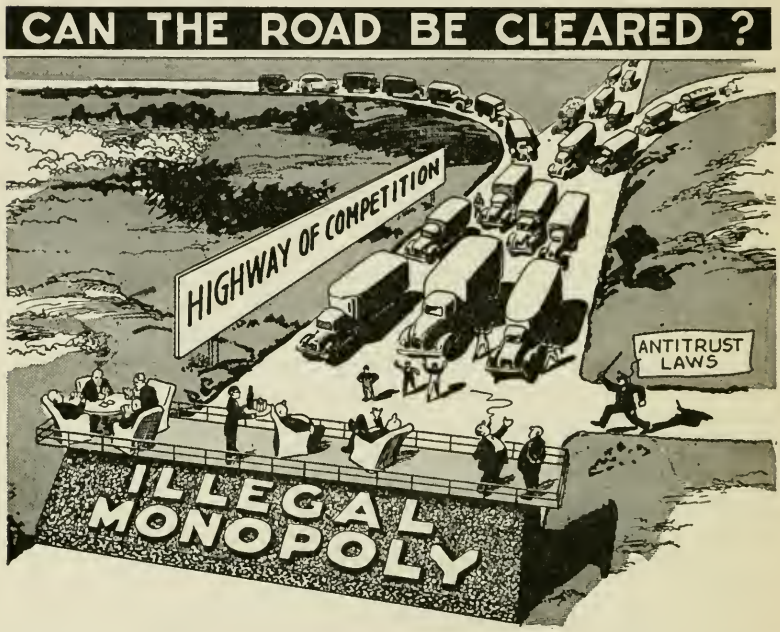
One general point comes out clearly from this decision: *free competition* doesn't mean that "anything goes." Competition may be tough and hard, with rewards for the winner and perhaps bankruptcy for the loser, but none the less there are certain "rules of the game" laid down by the law which must be observed.

Monopolies and the "Curse of Bigness"

Suppose that a producer in a given field becomes so large and powerful that he is able to absorb all (or almost all) of his competitors, or to force them out of business. This producer, controlling practically the entire supply of the commodity in question, will then be able to make consumers pay any prices he may set. Those persons who cannot, or will not, pay the prices demanded will simply have to "do without." The same results may be obtained if a few large firms in a given line of business make an agreement to control production, prices, and sales. In either case, the situation resulting is popularly called a *monopoly.*

Monopoly, except in certain special cases, is considered to be opposed to the public interest, and is forbidden by law. Among the Federal laws in this field are the Sherman Anti-Trust Act, the Clayton Anti-Trust Act, and the Federal Trade Commission Act.

It is generally agreed that the anti-trust acts have not halted the trend toward concentration of economic power in the United States. The reason is that in such industries as steel, automobiles, aluminum, rubber, and many others, only huge firms with vast resources can operate successfully. This has led to the condition which some observers characterize as the "curse of bigness."



Is bigness really a "curse"? There is no doubt that it does create certain social problems. On the other hand, it is only fair to point out that we cannot have modern, large-scale production without also having huge producers. For example, the assembly-line techniques which make possible the manufacture of millions of automobiles each year at prices which consumers can afford to pay cannot be used by small or even medium-sized firms.

It appears that the real curse is not "bigness" in production but "bigness" in economic power and control. The problem, as we now see it, is how to retain the benefits of the former while eliminating or minimizing the evils of the latter. In any event, from the angle of personal rights, the point is that the government has had to interfere with the freedom of action of businessmen in order to protect the rights of other businessmen and of the public.

Freedom of Contract

The rapid industrialization of the United States, although a major step forward in the history of economic progress, was accompanied by a number of unfortunate conditions, including low wages, unduly long hours, sub-standard working conditions, and use of child labor. In an effort to combat these evils, the states enacted various forms of *social legislation*—for example, laws setting minimum wages and maximum hours, and regulating the labor of women and children.

Employers appealed to the courts to declare such legislation unconstitutional. They maintained that these laws interfered with their liberty and property rights. The argument ran as follows: the Constitution forbids both Congress and the states to deprive any person of his liberty or property without due process of law. Among the rights most important to people in the business world is the privilege of entering into any contract which has a lawful purpose. Thus, a law forbidding an employer to pay less than a certain wage, for example, constitutes undue interference with the freedom of contract of both employer and worker.

In the famous case of *Lochner v. New York* (1905), the Supreme Court was called upon to decide this issue. The case involved the constitutionality of a New York law which limited working time in bakeries to 60 hours per week or 10 hours per day. The Court, in effect, had to choose between the police power of the state and individual freedom of contract. In a 5-to-4 decision, the highest tribunal ruled that the law interfered with the right of contract between employers and employees.

For a good many years after the Lochner Case, the Court continued to declare unconstitutional social legislation aimed at raising wages and improving other conditions of employment. The majority of the Justices repeated the argument that employers and workers should be "free" to enter into contracts without any interference by Congress or the state legislatures. In 1934, the Court issued a 6-to-3 decision which declared unconstitutional a minimum-wage law enacted by Congress for the protection of women and children workers in the District of Columbia. This was ruled to be a violation of the due process clause of the Fifth Amendment. In 1936, the Court by a 5-to-4 vote invalidated a minimum-wage law of New York State on the ground that it violated the due process clause of the Fourteenth Amendment.

During all these years, there was widespread criticism of the Supreme Court. The charge was made that the Court was basing its decisions on narrow legal ideas and was ignoring the "real

world." Many felt that these decisions were being motivated, consciously or unconsciously, by the personal social and economic preferences of the Justices. Critics maintained that the "freedom of contract" mentioned repeatedly in the decisions was little more than a legal fiction, because most workers, especially in a period of severe depression, could not possibly "bargain" on even terms with employers. Very often, a desperate family breadwinner had to take any job offered him, even at near-starvation wage rates.

CHARLES EVANS HUGHES (1862-1948)
In the course of his long, varied, and distinguished career, Charles Evans Hughes served as Governor of New York State, Associate Justice of the United States Supreme Court (1910-1916), Republican candidate for the Presidency (1916), Secretary of State under President Harding, Judge of the World Court, and Chief Justice of the United States Supreme Court (1930-1941). He wrote a number of notable decisions supporting civil liberties and upholding social legislation.

We have already noted (Chapter 1) that the Supreme Court is responsive in the long run, to changes in public opinion. In this instance, the Supreme Court definitely did an about-face. The first sign of the change was a number of decisions declaring maximum-hour laws constitutional. Then, in 1937, in the case of *West Coast Hotel Co. v. Parrish,* the Court issued a 5-to-4 decision which upheld for the first time a minimum-wage law passed by a state legislature. The reasoning of Chief Justice Hughes in this case is worthy of special note:

> "In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

It was on the basis of this expanding conception of the general welfare that the Supreme Court upheld various items of social legislation passed by the Federal government during the New Deal administration of President Franklin D. Roosevelt. These included the National Labor Relations Act (Wagner Act), the Fair Labor Standards Act, and the Social Security Act. On the other hand, the invalidation of such measures as the National Industrial Recovery Act and the Agricultural Adjustment Act of 1933 showed that the Court was still prepared to strike down economic and social measures which it considered unconstitutional.

Public Utilities—"Affected with a Public Interest"

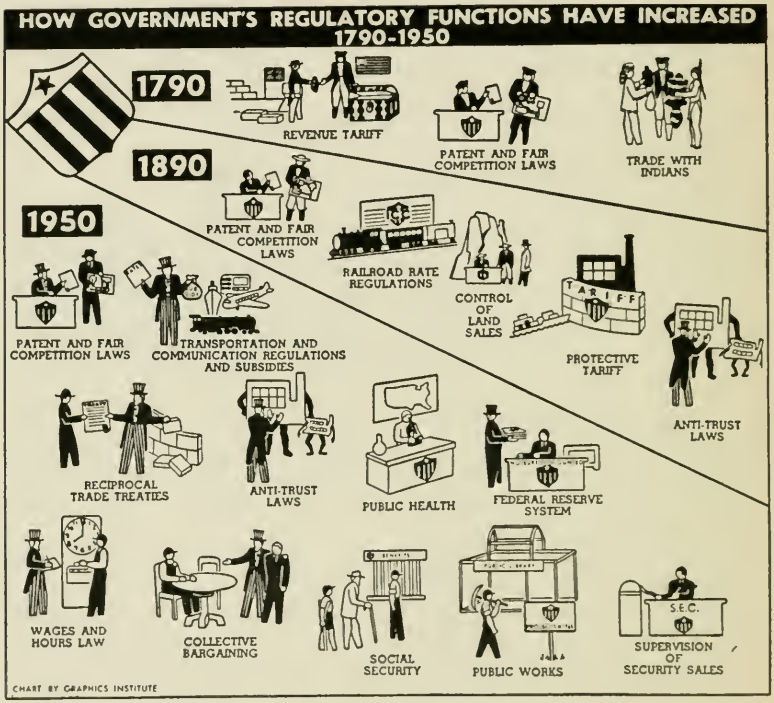
During the 1870's, several Middle Western states passed so-called *Granger laws*, which aimed to prevent grain warehouses and railroads from charging farmers unreasonable rates. The laws set up state commissions with power to establish and to enforce maximum rates for these essential services. Opponents of the Granger laws argued that they deprived private companies of their property rights without due process of law and, therefore, violated the Fourteenth Amendment.

In 1877, in the famous case of *Munn v. Illinois*, the Supreme Court was called on to decide just how far a state legislature might go in interfering with the private property rights of the owners of warehouses and railroads. The Court ruled that the Granger laws were constitutional and that the states could properly regulate the rates and services of those industries which were "affected with a public interest."

Since the key phrase is obviously a vague one, many cases were carried to the Supreme Court to settle the limits of governmental authority in this field. The decisions, in general, have established a class of industries known as *public utilities*, which are subject to a special degree of governmental regulation. These industries include, among others, transportation, communication, electric power, and gas supply. It should be noted that in all these cases, a firm operating in a given community or region will very probably have a monopoly status. It would not be feasible, for example, to have two bus lines operating over the same route, or to have two telephone systems servicing the same city. It is not the policy of government to destroy such "natural monopolies," but they must be closely regulated in the public interest.

In recent years, banking, insurance, and the milk industry have been subjected to extensive government regulation under the state's police power to protect the health and welfare of the people.

Since the first Granger laws of the 1870's, the regulatory power of government over our economic affairs has been vastly expanded. This power has been used in an attempt to deal with such characteristic modern problems as unemployment, insecurity, poverty, slums, dangerous or unhealthful conditions in industry, and labor-management relations. In time of war or national emergency, the government has introduced even more drastic forms of regulation.



Is this trend a good one? Some observers maintain emphatically that it is not. They regard the increasing power of government in the economic sphere as an invasion of our personal liberties and an interference with the "natural laws" of economics. One well-known economist has condemned the recent course of events as "The Road to Serfdom." On the other hand, there is a widely held point of view which maintains that these expanded activities of government, although occasionally open to criticism, are on the whole vitally necessary to make democracy work in a changing world.

In any event, it is unquestionably true that property rights are more fully protected today in the United States than in any other country of the world. All of us have the right to own property, to accumulate savings, to start and run a business, to engage in any occupation of our choice for which we can qualify, to change jobs at will, and to organize or join labor unions and trade associations. Our economic system still depends primarily on private enterprise, although within a framework of public control designed to protect the interests of all the people.

THINGS TO DO

1. Make a list of all the property rights which you enjoy as an American citizen. Then draw up a list of the property rights of residents of totalitarian countries. Explain the significance of the differences in the two lists.

2. The opinions of Chief Justice John Marshall in *Fletcher v. Peck* and in the *Dartmouth College Case* early in the nineteenth century went far toward shaping the American conception of property rights. Consult your American history textbook and other reference works, and explain the significance of these cases.

3. "In a very real sense a large measure of economic freedom is an inseparable condition of civil liberty itself." Do you agree with this statement? Do you think that it represents the traditional American attitude?

4. Arrange a round-table discussion in class on the following topic: "How far shall we go in setting up government controls over business and other phases of our economic life?" The panel should be equally divided, if possible, between those who feel that extension of governmental control is essential and those who feel that we have already gone far enough, or too far, in this direction.

The following books provide vigorous expressions of the two points of view to be presented in the debate:

The Road to Serfdom, by Frederick Hayek (University of Chicago Press, 1944).

The Road to Reaction, by Herman Finer (Little-Brown, 1945).

5. Write to the National Association of Manufacturers (14 West 49 Street, New York 20, N. Y.) and request a copy of the pamphlet *Our Free Enterprise System* by Phelps Adams. What is the general point of view of this pamphlet? Discuss it in class.

6. Prepare a book report for class presentation on one of the following books. In your report, emphasize the author's interpretation of property rights and free enterprise.

The Challenge of Liberty, by Herbert Hoover (Scribner's, 1934).

America Unlimited, by Eric Johnston (Doubleday, 1944).

Economic Roads for American Democracy, by William P. Van Til (McGraw-Hill, 1947).

The Bottlenecks of Business, by Thurman Arnold (Reynal, Hitchcock, 1940).

CHAPTER 5

HUMAN RIGHTS IN TIME OF CRISIS

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."
>
> —Supreme Court Justice David Davis
> (*Ex Parte Milligan*, 1866)

War and Freedom

"Cold wars" and "hot wars"—wars of nerves and wars of open violence and destruction—number among their greatest casualties the rights of human beings. Obviously, when a nation is engaged in a life-and-death struggle for survival, it cannot (or will not) observe all the restraints on governmental power that are accepted as a matter of course in "normal" times. When the United States becomes involved in war, the President, the Congress, and the military authorities are entrusted with the all-important task of gaining victory. To do this, they may have to take some measures that infringe on the individual's traditional liberties. Perhaps the most prominent single example of this is the system of compulsory military service. We have used the draft not only in the Civil War and in the two world wars of the twentieth century but also in the present period of international tension, when the nation is nominally at peace.

However, the fact that we Americans recognize the need for some restriction on individual rights during a critical situation does not mean that we are willing to ride roughshod over all standards of civil liberties. As a matter of fact, one of our primary aims in both world wars was the preservation and the extension of human rights, both in this country and all over the world. That is still our creed today, in our resistance to totalitarian aggression and

totalitarian ideas. We are appealing to the peoples of the world on this basis. Accordingly, it is certainly up to us to prove our sincerity and our good faith by keeping our structure of human rights intact, so far as possible, even in a time of crisis.

Lessons From Our History

The experience of history teaches us that interference with human rights during a time of war may be caused not only by military necessity but also by fear, unwarranted suspicion, and political animosity.

It was during our undeclared war with France in 1798 that the Federalist Party pushed through Congress one of the first laws which interfered with freedom of speech and press in this nation. The *Sedition Act* of 1798, framed in the name of national security, provided severe penalties for anyone who uttered or published any "false, scandalous, or malicious" statement concerning the President or Congress, or attempted to bring them into "contempt or disrepute." Although the war was offered as the justification for this tyrannical measure, its real purpose was to weaken Thomas Jefferson's Republican Party and to pave the way for its destruction. Under the Sedition Act, some twenty-five persons were arrested, and ten were convicted and punished. When Jefferson became President in 1801, he pardoned all those who had been convicted under this law. The law itself expired and was not renewed until World War I.

During the Civil War, widespread violations of human rights occurred: newspapers were suppressed; the writ of habeas corpus was suspended by the President; and many civilians were arrested and imprisoned by military authorities. Two years after the close of the war, the Supreme Court ruled in *Ex Parte Milligan* that civilians may not be tried by military commissions when the civil courts are in full operation.

Sedition in World War I Period

Sedition has been defined as "excitement of discontent against the government, or excitement of resistance to lawful authority." It is something less than *treason*, for it does not carry the idea of attempting to overthrow the government or of giving "aid and comfort" to the nation's enemies in time of war.

When our country entered World War I in 1917, Congress passed the *Espionage Act*, which imposed a penalty of 20 years' imprisonment plus a $10,000 fine on anyone found guilty of obstructing the draft, interfering with military operations, or causing insub-

This picture shows William Lloyd Garrison, the great abolitionist, at work in the humble printing office of his newspaper, *The Liberator*. Garrison's long, difficult, and successful fight against Negro slavery is a significant historical vindication of the principle that "In a democracy, the right to disagree with the majority is sacred."

ordination in the armed forces. The following year, the *Sedition Act* was passed. This law not only prohibited any deliberate obstruction to the sale of United States bonds, but also provided penalties for any "disloyal, profane, scurrilous, or abusive language" regarding our form of government, the Constitution, the flag, and the uniforms of the armed forces.

There were more than 1500 arrests under these laws. Many persons were sentenced to long prison terms. In addition, more than 4000 conscientious objectors were rounded up, and 450 were sentenced to serve terms in military prisons.

Cases involving the constitutionality of these laws reached the Supreme Court only after the close of the war. In the famous case of *Schenck v. United States* (1919), Justice Holmes, speaking for a unanimous Court, declared the laws constitutional and found the defendants guilty. The Court decided that the defendants had tried to cause insubordination in the military forces by sending newly drafted men circulars and pamphlets denouncing the draft and urging them to assert their rights against the government. This was an interference with the power of Congress to raise armies.

It was in this case that Justice Holmes set forth his "clear and present danger" rule as a working principle to determine the legality of a defendant's words in freedom of expression cases.

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight. . . ."

The difficulty of applying this rule to an actual case can be clearly seen in *Abrams v. United States* (1919). Here the Court upheld the conviction and the prison sentence imposed on the defendants because they had issued pamphlets condemning American intervention against the newly-established Soviet regime in Russia. In a 7-to-2 decision, the majority found a clear and present danger to the government of the United States. Justices Holmes and Brandeis dissented in an opinion which has become justly famous. (See quotation on page 13.)

Radicalism After World War I

The close of World War I initiated a period when respect for civil rights was at one of the lowest points in our history. Hatred of radicals (Socialists and Communists), pacifists, and aliens led more than twenty states to pass vague "sedition" and "criminal syndicalism" laws which prohibited advocacy of the overthrow of the government and forbade any program of force or violence to change our economic and social institutions. The purposes of these laws, thus stated, may not sound improper, but their effect in practice was to outlaw any action, or even propaganda, designed to bring about changes which were opposed by the dominant elements in the community.

It was during this period that United States Attorney-General Mitchell Palmer staged many raids on the homes of labor leaders, aliens, and other persons suspected of "radical" leanings. Thousands were arrested, but the vast majority of these had to be released because they were innocent of any wrong-doing—beyond supporting unpopular ideas. At about the same time, the New

York State Legislature expelled five members duly elected on the Socialist Party ticket, although that party was legal in New York.

Under the California Syndicalism Act (which was fairly typical of other state laws of this type), more than 500 persons were arrested over a period of five years. The most important of these cases to come to the attention of the Supreme Court was *Whitney v. California* (1927). The defendant was charged with violation of the clauses of the California law prohibiting organization of or adherence to any group that advocated "unlawful acts of force or violence or . . . terrorism as a means of accomplishing a change in industrial ownership or effecting any political change." The conviction of the defendant was not based on any action which she personally had taken, but rather on the fact that she was a member of the Communist Labor Party, which advocated violent revolution. The Supreme Court upheld the conviction, ruling that the law was a reasonable exercise of the police power.

However, ten years later, with the postwar atmosphere of suspicion, fear and hysteria dispelled, the Supreme Court returned to the defense of the rights of the individual. As mentioned in Chapter 2, the Court in the case of *DeJonge v. Oregon* (1937) declared void a criminal-syndicalism law of the state of Oregon which made mere attendance at a Communist meeting a criminal offense. In *Herndon v. Lowry* (1937), the Court threw out the conviction of a Negro organizer for the Communist Party who had been convicted under an old Georgia "insurrection" law. He had been charged with the distribution of literature which, according to the state's interpretation, advocated the violent overthrow of the government. The Court decided that mere possession of Communist literature could not be interpreted as incitement to violent insurrection. To punish a man for this was to deprive him of his liberty without due process of law.

The Japanese Evacuation of the West Coast

One of the most tragic stories of World War II is the treatment which the 112,000 Japanese-Americans living on the West Coast received from the Federal government and from their Caucasian neighbors. Fully 70,000 of these persons were United States citizens by birth. The others, since they had been born in Japan, were not eligible for citizenship, but the vast majority were law-abiding, hard-working men and women who had lived in this country for many years and had never given the slightest indication of disloyalty. None the less, in the days immediately after Pearl Harbor, there was widespread fear that espionage, sabotage,

and other "fifth-column" activities might be practiced by the Japanese-American population of California.

Shortly after the declaration of war, the President issued an executive order and Congress passed laws which authorized the Army to set up special military areas, subject to military control, anywhere in the United States. By the spring of 1942, the entire Pacific Coast had been declared such an area. A curfew regulation requiring all persons to remain indoors from 8 P.M. to 6 A.M. was issued, but was made applicable only to aliens and to *all* persons of Japanese ancestry (citizens as well as aliens). Then a program was undertaken to move all the Japanese in the Pacific Coast area to detention camps ("relocation centers") farther inland. By the summer of 1943, this program was substantially completed.

Spokesmen for the Federal government conceded that the relocation program was a drastic one and that it caused suffering to many loyal persons, but defended it on the grounds of pressing military necessity. The Supreme Court, in three decisions, upheld most of the government's measures on this basis.

In *Hirabayashi v. United States* (1943), the Supreme Court supported the curfew regulation described above on the ground that military authorities have the right to exercise control over civilians, and even to discriminate against a particular group, when it is their judgment that the military security of the nation is at stake,

In *Korematsu v. United States* (1944), the Court by a 6-to-3 vote sustained the constitutionality of the military evacuation order which removed the Japanese-Americans from their homes in the Pacific Coast region to the war relocation centers. This, too, was defended as a security measure necessitated by an acute national emergency. Admittedly, the entire Japanese-American population of the Pacific Coast was not disloyal, but it was impossible to isolate the dangerous elements within the time available.

The third case, *Ex Parte Endo* (1944), marked the only victory for individual rights in this war-relocation controversy. In this case, the Supreme Court declared that an American citizen of Japanese ancestry whose loyalty to the United States had been investigated and upheld could not be detained against his will in a relocation center. The Court did not clarify such problems as the procedure for establishing loyalty, and the extent to which one whose loyalty is regarded as questionable might be detained.

Perhaps the last word on this subject belongs to the 442nd Regimental Combat Team—a United States Army unit consisting of Americans of Japanese ancestry. These men were permitted to enlist in the Army only after they and their families had been sent

to the detention camps. Their answer to those who questioned the loyalty of the Japanese-Americans was a war record of unsurpassed brilliance. The 442nd Regimental Combat Team fought with great skill and bravery, and has been called "the most decorated unit of its size in the United States Army."

Radicalism After World War II

Strained relations between the United States and the Soviet Union since the close of World War II have called into question the status of the Communist Party and of individual Communists in the United States. This is because the Communists are unqualified supporters and admirers of the Soviet Union and all its policies. Suspicion of the Communists has been intensified by undeniable evidence of an organized attempt to steal atomic bomb secrets and other vital information for transmission to Russia. These revelations have strengthened the position of those who maintain that Communism in the United States is not in any sense a political party or even a radical reform movement but rather part of an international conspiratorial plot to overthrow our government and set up a Soviet regime here.

The Conviction of the Communist Leaders

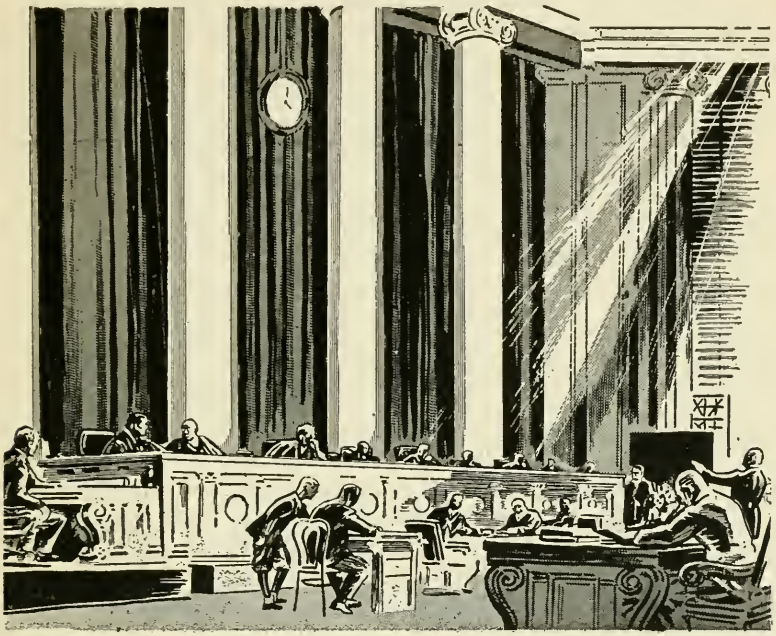
On June 4, 1951, the Supreme Court upheld the convictions of eleven top Communist leaders in the United States for violation of the Smith Act of 1940. This was undoubtedly one of the most important decisions in the recent history of the Court.

The men in question were indicted under the Smith Act, the specific charge being that they had conspired to teach and advocate the overthrow of the United States government by force and violence. After a turbulent nine-month trial (January to October, 1949), all eleven were found guilty.

It should be noted that the conspiracy charged in this case was not to overthrow the government, but to *teach and advocate* the violent overthrow of the government. The defendants claimed that the right to "teach and advocate" is inviolable under the Constitution, and that therefore the Smith Act is unconstitutional. In addition, they tried to convince the jury (and later the Supreme Court) that the Communist Party does not favor the violent overthrow of the government.

Of the eight Supreme Court Justices participating in this case (Justice Clark did not take part), six upheld the convictions and two dissented. Chief Justice Vinson, delivering the opinion of the majority, upheld the constitutionality of the Smith Act on the

ground that Congress has the power to protect the government against attempts to produce change by "violence, revolution, and terrorism." In guarding our society against "armed internal attack," Congress can properly limit freedom of speech.



An artist's impression of the Supreme Court in session.

With the constitutionality of the law thus established, the next problem confronting the Court was whether this statute could be applied to the defendants, who claimed that they were exercising their freedom of expression and assembly guaranteed by the First Amendment. This brings us to the "clear and present danger" rule. Did the activities of these eleven Communists constitute a "clear and present danger" to our governmental institutions, which Congress had tried to prevent by passing the Smith Act? The answer of the Chief Justice is significant:

> "Petitioners (the defendants) intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence.

Justice Black dissented sharply, maintaining that the defendants had been deprived of their constitutional rights of freedom of expression and assembly. The Justice suggested that the conviction and the law on which it was based expressed only a temporary reaction to a world crisis, rather than the enduring tradition of American freedom.

> "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

Justice Douglas based his dissent, in part, on the view that there was no clear and present danger in this case. He said:

> "Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims."

The majority decision makes it clear that it is now unlawful for anyone to teach or advocate (or to conspire to teach or advocate) the violent overthrow of our government. On the basis of this decision, in June 1951, twenty-one other Communist leaders were indicted for violation of the Smith Act.

The Internal Security Act of 1950 (McCarran Act)

Now that the Smith Act has been declared constitutional in the case of the eleven Communists, the Internal Security Act of 1950, popularly known as the *McCarran Act*, takes the center of the constitutional stage. This lengthy omnibus law seeks to protect the United States against subversive activities by a variety of devices. President Truman vetoed the bill on many grounds—among which was the charge that it would "greatly weaken our liberties and give aid and comfort to those who would destroy us" —but Congress repassed it by more than the two-thirds vote needed to override the veto.

One section of the law makes it unlawful for any person to contribute to the establishment within the United States of a totalitarian dictatorship subject to foreign control. This, of course, refers to Communism and the Soviet Union.

Another section requires the registration of all "Communist-action" and "Communist-front" organizations. Registration involves listing the names and addresses of members. A number of

disabilities accompany this listing, including disqualification from Federal employment, denial of passports, and limitation of use of mails. The penalty for violating this registration requirement is a prison sentence of from five to ten years.

In the event of war or insurrection, the Attorney-General is empowered to arrest and detain any person "as to whom there is reasonable ground to believe . . . will engage in acts of espionage or of sabotage."

A five-man *Subversive Activities Control Board* has the job of holding hearings to determine whether organizations are properly designated as "Communist-action" or "Communist-front."

The law also provides for sweeping changes in the procedure governing immigration, naturalization, and the issuance of passports.

Loyalty Investigations

The need for security measures and for precautions against espionage and sabotage is obvious. No reasonable person can object to a program designed to eliminate disloyal and untrustworthy individuals from government service and from employment in vital defense plants.

Loyalty investigations have been going on for some time. The Un-American Activities Committee of the House of Representatives has been engaged in the disclosure of subversive activities since 1938. On the state level, there have been investigations recently by the Tenney Committee in California, the Canwell Committee in Washington, and the Broyles Commission in Illinois.

The President's Loyalty Order of 1947 aimed to prevent the infiltration of disloyal persons into the government service and, at the same time, to afford loyal employees protection against unfair accusations. The investigation procedure provided for involves a probe by the FBI into all phases of an employee's past and present activities—including his friends, reading materials, organizational tie-ups, and expressions of opinion. If the evidence collected indicates some reason for suspicion, the person in question may be called before a loyalty board for a hearing. At this hearing, however, the names of the confidential informants who have presented the evidence against him are not disclosed and he is not given an opportunity to cross-examine them. A Loyalty Review Board hears appeals from decisions of the original loyalty board.

The Attorney-General has been given the power to draw up a list of subversive organizations—totalitarian, Fascist, and Communist. Membership in any one of these organizations may subject a person to the suspicion of disloyalty.

Those who defend this procedure argue that in the present critical period only persons of absolutely unquestionable loyalty are entitled to hold government positions. If there is any substantial element of doubt, it is maintained, the suspected individual must go, in the interests of national security and the general welfare. Under the circumstances, it is not possible to follow judicial procedures or to grant accused parties all the protection and immunities they would enjoy in a court of law. If an attempt were made to do this, it would be virtually impossible to "prove" that *anyone* is disloyal.

Those who criticize the loyalty investigation program do not generally question the need for reasonable measures which will expose the disloyal. They argue, however, that the methods now used show very little regard for the rights of individuals. Secret files, unnamed informants, and political police procedures, it is said, are more in keeping with Communist and other totalitarian ideologies than with the best traditions of our way of life. Another complaint is that, under the present program, the emphasis is not really on uncovering disloyalty, in any meaningful sense of that term, but rather on stigmatizing ("smearing") persons whose ideas on social and political problems may be somewhat unorthodox.

The debate on the loyalty program is a spirited one, but there are several points generally accepted by reasonable people.

1. Persons whose loyalty may reasonably be called into question must not be allowed to hold responsible jobs.

2. Of the many thousands of government employees investigated recently, only a tiny percentage have been found disloyal.

3. We must not as a nation engage in any "witch hunts," and we must not use the label of "Communism" to discredit anyone with whose opinions most of us may not agree. In a democracy, the right to disagree with the majority is sacred.

The Supreme Court Judges the Loyalty Program

In April, 1951, the Supreme Court handed down two important decisions dealing with the President's Loyalty Order of 1947 and the program based on it.

In a 5-to-3 decision, the Court declared that the Attorney-General must *prove* that organizations listed as "subversive" actually merit that designation. In this decision, the majority ordered the cases of three organizations listed as Communist by the Attorney-General to be sent back to the lower courts for re-hearings. At each re-hearing, the Attorney-General is to present

his evidence, and the organization in question is to be given an opportunity to disprove the charges against it.

The other case involved the first person dismissed under the President's loyalty program. The young woman in question had been charged with being a member of the Communist Party, but had not been allowed to see or question her accusers, who were certified to the loyalty board by the FBI as "experienced and entirely reliable." She was then dismissed (in 1949) because "reasonable grounds" existed for the suspicion that she was disloyal. By a 4-to-4 vote, the Supreme Court upheld the legality of this procedure. (In the event of a tie vote among the Justices, the opinion of the lower court prevails.)

Taft-Hartley Non-Communist Affidavit Cases

In 1947, Congress passed the Taft-Hartley Act, including the provision (among many others) that a labor union cannot take advantage of the facilities of the National Labor Relations Board unless all the officers of the union swear that they are not members of, or affiliated with, the Communist Party, and that they do not believe in or support any organization that teaches the overthrow of the United States government by force or by other illegal means.

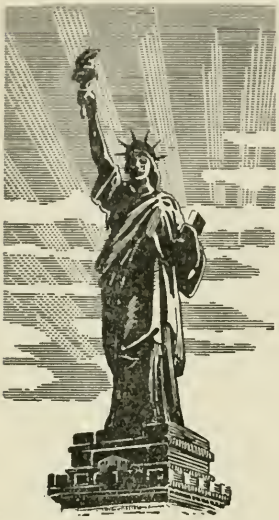
The Supreme Court upheld the constitutionality of the oath in the case of *American Communications Association v. Douds* (1950). Since three members of the court did not take part in the case, the issue was decided by the vote of six Justices. Four separate opinions were written.

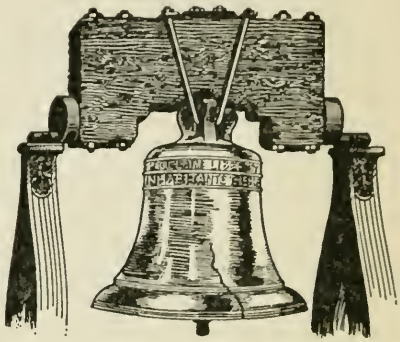
The majority opinion, written by Chief Justice Vinson, stated that Congress can require labor union officials to sign a non-Communist affidavit in order to protect interstate commerce against "political strikes." The opinion stated that Communist labor leaders had actually engaged in such strikes, not to improve working conditions but to support the policies of a foreign government. Although this oath requirement is, in a sense, interference with the rights of an individual, it is necessary for the public welfare. There are times when the commerce clause has priority over the Bill of Rights.

Justice Jackson, in his opinion, agreed with the majority that Congress can require officers of labor unions to disclose their membership in or affiliation with the Communist Party. Under the situation existing today, consideration of public welfare must "outweigh any affront to individual dignity." However, that part of the oath which requires a person to state that he does not believe in the violent overthrow of the government is unconstitutional, in

the opinion of Justice Jackson, because it interferes with a man's *thoughts*, rather than his actions. Justice Frankfurter agreed with this line of reasoning.

Justice Black's dissenting opinion declared that the non-Communist oath requirement was a violation of the First Amendment.





"PROCLAIM LIBERTY THROUGHOUT ALL THE LAND AND TO ALL THE INHABITANTS THEREOF."
— LEV. XXV, 10

Two world-famous symbols of American freedom—the *Statue of Liberty*, which stands in the harbor of New York City; and the *Liberty Bell*, in Independence Hall, Philadelphia.

"The Years of the Oaths"

The past few years can be described from the standpoint of human rights as "the years of the oaths." Besides the non-Communist affidavit requirements of the Taft-Hartley Act, a considerable number of states and local communities have prescribed loyalty oaths for teachers and other public employees. In New York State, laws have set up investigative machinery to disclose membership of teachers and other public employees in subversive organizations. Other states have similar laws. In addition, the problem of loyalty oaths has arisen in our universities. The best known of these cases have involved the Universities of Washington and California, where professors were dismissed for refusal to sign non-Communist statements or oaths.

The constitutional issues involved in these laws and requirements will eventually reach the Supreme Court. Meanwhile, it is the duty of all of us to keep calm, to retain faith in our basic traditions and institutions, and to throw whatever influence we may have always on the side of moderation, fair dealing, and true Americanism. President Truman has expressed this well:

> "Our country has been through dangerous times before, without losing our liberties to external attack or internal hysteria. Each of us, in Government and out, has a share in safeguarding our liberties. Each of us must search his own conscience to find whether he is doing all that can be done to preserve and strengthen them."

THINGS TO DO

1. Appoint class committees to read and analyze two important pamphlets prepared by the United States government: *Fascism in Action* and *Communism in Action.* Each committee should then submit a careful report to the class, explaining how and why the ideology in question presents a grave threat to democracy. (The pamphlets may be obtained from the United States Government Printing Office, Washington 25, C. D.)

2. Organize a class debate on the following topic: *Resolved*—That the Communist Party in the United States be outlawed.

3. The argument has been made that, since the Soviet Union does not allow any pro-democratic or pro-capitalist groups to exist within her territories, we should retaliate by vigorously repressing all radical groups within the United States which are critical of our basic institutions. What do you think of this argument?

4. Read the following statement by the late Supreme Court Justice Frank Murphy:

> "Some of us, under the tension of political and economic conflicts, have let ourselves forget that civil liberty is not just for those whom we agree with but also for those whose ideas are hateful to us. We have forgotten that civil liberty is not just a problem for the federal and state governments, but something that must be protected first of all by every individual citizen. The Federal Government, for example, cannot effectively protect the civil liberty of the individual unless public-spirited citizens in every community have the courage to come forward and co-operate with the Federal Government in seeing that the rights of the humblest and most unpopular minority are scrupulously protected."

Explain what this statement means to you, in terms of your own personal attitudes and your everyday actions and living habits.

5. Read one of the chapters (preferably I or XV in Zechariah Chafee's *Free Speech in the United States* (Harvard University Press, 1946). Discuss it with your friends and classmates.

CHAPTER 6

OUR CHANGING CONCEPTION OF HUMAN RIGHTS

> "A word is not a crystal, transparent and unchanging; it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and the time in which it is used."
>
> —Supreme Court Justice Oliver Wendell Holmes, Jr. (*Towne v. Eisner*, 1918)

> "The constitutional fathers, fresh from a revolution, did not forge a political straightjacket for generations to come."
>
> —Supreme Court Justice Frank Murphy (*Schneiderman v. United States*, 1942)

Words and Ideals

Liberty, equality, property, citizenship—these are the key words in the history of the struggle for human rights. Like most important words, they mean different things to different men, and are too often used to inject emotional heat, rather than rational light, into discussions. That is why it is constantly necessary to study these terms, analyze them, interpret them, and redefine them in accordance with changing needs and conditions.

Although the specific content of these words may change, they remain, as they have always been, expressions of a great ideal. They point the way to good will among men, respect for the human personality, and a society which offers all of us a chance to live in peace and dignity.

We can appropriately conclude our survey of human rights by reconsidering these key terms, with particular emphasis on what they mean, and what they do *not* mean, in today's world.

Liberty

The word *liberty* appears in three places in our Constitution. The Preamble states that one of the purposes of the Constitution is "to secure the blessings of *liberty* to ourselves and our posterity." The Fifth Amendment and the Fourteenth Amendment forbid the Federal government and the states, respectively, to deprive any person of his life, *liberty*, and property without due process of law.

This inspiring word has had a remarkable history. Originally, liberty was associated primarily with resistance to a despotic ruler or a tyrannical government. Thus, liberty was thought of in terms of *restraint on authority*, and was often used in connection with the rights of an accused person.

Toward the end of the nineteenth century, the term came to mean, in part, freedom of contract. This interpretation helped employers to resist the social legislation which, as we have seen in Chapter 4, attempted to protect workers against some of the worst abuses of the new industrialism.

During the last fifty years, the concept of liberty has expanded until it now encompasses many new ideas. Today, the "liberty" referred to in the Fourteenth Amendment is interpreted as including the five great human rights listed in the First Amendment: freedom of speech, press, religion, petition, and peaceable assembly. Neither the Federal government nor a state government can deprive a person of any of these five liberties unless it can be proved to the satisfaction of the courts that the general welfare necessitates such action. Thus, a citizen of a state can appeal to the Supreme Court if he feels that the state government has unjustly deprived him of any of these five rights. This is what is meant by the "nationalization of the Bill of Rights."

In criminal law, liberty has come to suggest due process of law and the guarantee of a fair trial.

It is clear from this brief survey that liberty, at any given time, means pretty much what we want it to mean. The American tradition, under the guidance of such great figures as Thomas Jefferson and Oliver Wendell Holmes, Jr., has been to expand constantly the scope of this concept and to strengthen the guarantees it implies. Whether or not this tendency will continue in the future remains to be seen. It is as true now as in the early days of our nation that "eternal vigilance (plus sound understanding and a good deal of hard work) is the price of liberty."

Equality

The word *equality* appears both in the Declaration of Independence and in the Federal Constitution. Every schoolboy knows the ringing phrase: "All men are created equal." Far fewer of us, unfortunately, are familiar with the less ringing, but none-the-less important, provision of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Since the American and French Revolutions brought the idea of equality to the fore as a social ideal, many attempts have been made to clarify its meaning. Some disillusioned observers came to the conclusion that equality is merely an empty phrase, without significance in the real world. Thus the great French writer Anatole France once referred bitterly to "the majestic equalities of the law which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." G. K. Chesterton, famous English writer, took a much more constructive point of view when he tried to explain equality by comparing men with pennies. Among men there are many individuals who are bright and many who are dull, just as there are bright and dull pennies. But all pennies, whether bright or dull, have an equal value because they are impressed with the stamp of their government. And all men are equal because they, too, bear the stamp or image of their Maker.

In other words, no sensible person maintains that men are equal in intelligence, character, looks, skill, physical prowess, or many other respects. They are equal in their *essential value as human beings*, and it is on this basis that they are entitled to equal opportunities in society and equal treatment under the law.

The struggle for equality, over a period of many centuries, was directed against slavery, serfdom, and feudal restrictions. Then it became a fight against tyrannical monarchs and a class system based on special privileges.

More recently in the United States, the struggle for equality has aimed at such advances as the attainment of rights for women; elimination of racial and religious prejudices in education, housing, and employment; minimum living standards and social security for all; and perfection of our democratic political institutions.

Progress Towards Greater Equality

There is still a great deal of inequality in our country which can and should be eliminated. Such inequality is being fought on a wide front by many individuals and organizations. In this section,

we shall review some of the recent gains scored in this campaign of which we can all justly be proud. It will be noticed that most of these cases have involved the status of Negroes. Other minorities have also been the victims of discrimination, including persons of Oriental descent (especially on the West Coast), Spanish-speaking persons of Latin-American origin (especially in our Southwestern states), Indians, Jews, and Catholics. The Negro problem, however, is by far the largest and most difficult one in this field.

Segregation in Housing: Cities which passed housing ordinances segregating Whites and Negroes found the Supreme Court unsympathetic to such discrimination. In 1917, the Court ruled that such laws violated the clause of the Fourteenth Amendment which protects a person's property against arbitrary interference by the state. (This, of course, does not eliminate segregation based on custom or on social pressure.)

A later attempt to prevent Negroes and other minority groups from purchasing land in certain areas took the form of the *restrictive covenant.* This is generally a written agreement among property-owners in a certain area that only members of the "white race" may own or occupy property within the area. In 1948, the Supreme

Court ruled unanimously (three Justices not taking part) that restrictive covenants are not illegal in themselves, but that neither Federal nor state courts have the power to enforce them. Federal courts cannot enforce such agreements because to do so would violate the Federal law which guarantees to all citizens equal right "to inherit, purchase, lease, sell, hold, and convey real and personal property." State courts cannot honor such contracts because this would amount to state action depriving persons of "equal protection of the laws" in violation of the Fourteenth Amendment.

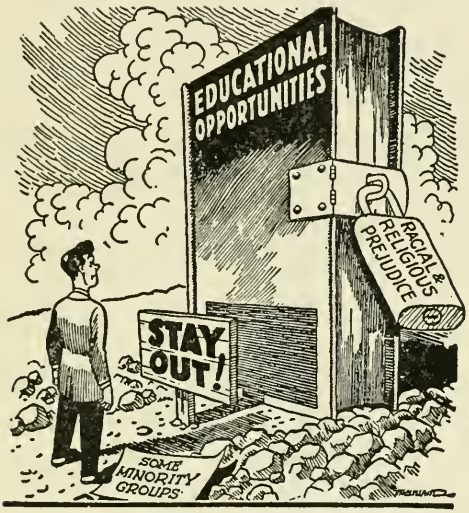
Social Discrimination: After the Civil War, Congress passed the Civil Rights Act, prohibiting racial discrimination in hotels, public conveyances, and places of public recreation. The Supreme Court ruled in 1883 that private persons could not be sued for violating these regulations; only state officials who had misused their power, under the terms of Federal laws designed to carry out the Fourteenth Amendment, could be punished (*Civil Rights Cases*). This interpretation has made it possible for the states to deal with discriminatory practices as they see fit. However, the Court did rule in *Plessy v. Ferguson* (1896) that segregation laws must meet the requirements of the "separate but equal" rule. In other words, when the races are separated by law, the facilities provided for each must be substantially equal.

This form of discrimination, however, seems to be undergoing a gradual process of wearing down through "erosion." Eighteen states now have laws forbidding such discrimination, to a greater or lesser extent. The Federal courts have forbidden segregation in interstate buses, excursion boats, and national airports. In June, 1950, the Supreme Court decided that the segregation of Negroes in railway dining cars is a violation of the Interstate Commerce Act, which forbids "unreasonable prejudice."

Educational Opportunities: One of the most serious complaints of the Negro people, especially (but not exclusively) in the South, is that they do not enjoy equal educational opportunities with other members of the community. For many years, a vigorous attempt has been made to remedy this condition. The Supreme Court has ruled that educational segregation is lawful—that is, that separate schools may be set up for Negroes and Whites—but that the facilities must be substantially equal for both races. This is an application of the famous "separate but equal" rule set down in *Plessy v. Ferguson.*

In recent decisions on this subject, the Supreme Court has shown that it cannot be easily satisfied that facilities are really equal. In the case of *Sweatt v. Painter* (1950), the Court ordered the

state of Texas to admit to the University of Texas Law School a qualified Negro who had applied for admission there. True, Texas had established a separate law school for Negroes. However, the Supreme Court decided, on the basis of such factors as number of teachers and students, library facilities, scholarship funds, and the nationwide prestige that goes with a great educational institution, that the Negro law school was not, and could not be, "substantially equal" to the regular University of Texas Law School. In the case of *McLaurin v. Oklahoma* (1950), the Court held



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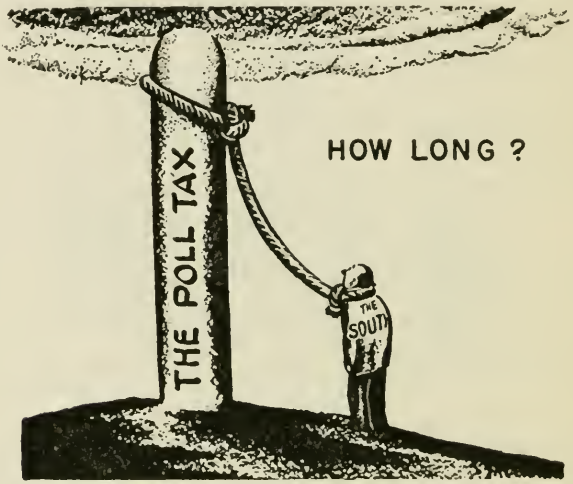
unanimously that once Negroes have been admitted to state-supported graduate schools, they must receive the same treatment and enjoy the same privileges in these institutions as any other students. Whenever the Court finds that the states have failed to provide equal facilities, it rules that there has been a denial of the "equal protection of the laws." Unfortunately, not all cases involving this important social issue reach the Supreme Court.

Fair Employment Practices Legislation: Unfortunately, discrimination against various racial and religious minorities in the United States extends to the field of employment. Negroes have been the worst sufferers in this respect.

During World War II, when there was a severe manpower shortage, it became vitally necessary to make full use of the skills and brains of all elements of the population. To help achieve this purpose, President Roosevelt set up a *Fair Employment Practice*

Committee (*FEPC*). All agencies of the Federal government handling procurement were directed to insert in every contract a "fair employment practice" clause forbidding discrimination in employment based on race, color, religion, or national origin. When a complaint was received, the FEPC made an investigation and was authorized to order the employer to eliminate the abuse. Most complaints came from Negroes. This arrangement on the whole was fairly successful in opening up many new employment opportunities to Negroes and members of other minorities.

The FEPC passed out of the picture in 1946, but several states (including New York, New Jersey, Connecticut, New Mexico, Rhode Island, Oregon, and Massachusetts) have continued its aims by passing similar laws against discrimination in employment.



Little in the *Nashville Tennesseean*

A Southern newspaper speaks its mind about the poll tax.

Protection of Suffrage: There is no necessary connection between citizenship and suffrage (the right to vote). Most high school students are citizens, but they are not allowed to vote because they do not meet the age requirements of the states. The individual states have the power under our Constitution to determine qualifications for voting, and they have set up a variety of requirements, including not only age but also residence, literacy and the payment of a poll tax. The Fifteenth and Nineteenth Amendments state merely that no person may be deprived of the right to vote on account of race, color, previous condition of servitude, or sex.

On the other hand, the Supreme Court has indicated that it will protect the right to vote when the requirements set up by a state are obviously discriminatory and unfair. In 1915, the Court declared unconstitutional the "grandfather clauses," by which several Southern states denied the right to vote to all persons whose grandparents had been slaves, unless they could pass a special literacy test. Such requirements were obviously directed against Negroes and thus constituted a violation of the Fifteenth Amendment.

Poll taxes and local intimidation still prevent many Negroes in our Southern states from voting. The recent repeal of the poll tax in South Carolina and Tennessee is evidence of substantial progress. Only five states now retain this restriction.

With the exception of the Negroes in the South, the right of suffrage is now generally well protected in the United States.

Voting in Primaries: Since the Civil War, our Southern states have almost invariably been "solidly" Democratic in politics. In the vast majority of cases, it is a foregone conclusion that the candidate nominated by the Democratic Party will be victorious in any state or local election. Therefore, the real political contest, in most cases, is the primary election of the Democratic Party. The regular election is little more than a formality.

Recognizing this fact, the authorities in a number of Southern states decided that even if they could not deny Negroes the right to vote in the regular elections, they would bar them from the primaries. Thus, the Negroes would be effectually prevented from exercising political power.

Texas was one of the states which passed laws to prevent Negroes from voting in the Democratic primaries. In a series of four cases, from 1927 to 1944, the Supreme Court was called in to decide whether or not such action was constitutional.

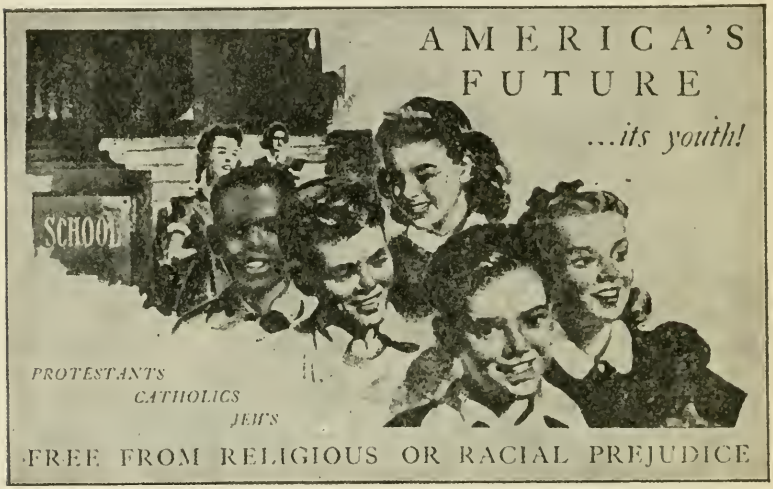
In the first case the Court voided a Texas law which deprived Negroes of the right to vote in the Democratic primaries. The Court held that this was a denial of equal protection of the laws.

The second case involved a Texas law which gave the Democratic Party the right to set up qualifications for voting in its primaries. The Party promptly excluded Negroes. This, too, was invalidated by the Court on the ground that the state was really trying to do indirectly what it could not do directly.

Although the third case was a victory for Texas, it turned out to be only a temporary one. In the last of the four cases (*Smith v. Allwright*, 1944), the majority of the Justices clearly and definitely upheld the right of qualified Negroes to vote in the Democratic

primaries in Texas. This decision was based on the Fifteenth Amendment to the Constitution, which forbids any state to deny the right to vote "on account of race, color, or previous condition of servitude."

Jury Duty: In some of our Southern states, Negroes have been consistently kept from serving on juries. Whenever a Negro has been convicted by an all-White jury from which Negroes were "systematically and deliberately excluded" and the case has been appealed to the Supreme Court, the Court has held that the convicted party was denied the "equal protection of the laws." Some states have tried to get around this firm judicial rule by including at least one Negro on juries in trials involving a Negro accused of a crime.



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This poster emphasizes the fact that the elimination of prejudice and inequality is a duty which we owe not only to ourselves but, above all, to future generations of Americans.

Property and Property Rights

In Chapter 4, we considered the significant changes which have taken place in our conception of property and property rights. We noted that the extent of government regulation over private property and private enterprise has grown tremendously. The anti-trust laws, the control of public utilities, and the passage of many forms of social legislation are all evidence of this.

In recent years the Supreme Court has sustained a considerable number of laws which limit property rights, directly or indirectly, in the interests of working people. Collective bargaining has been upheld as a "fundamental right," on the theory that unions are "essential to give laborers an opportunity to deal on an equality with their employer." Various tactics and weapons of labor unions, including strikes, boycotts, and picketing have been upheld by the Court. On a somewhat different plane, the Court has supported the constituionality of social security laws, which impose certain restrictions and expenses on the great majority of private businesses. All this is a far cry from the days when the Court considered the rights of private property and private contract so unalterably sacred that even laws setting minimum-wage scales for women workers were declared unconstitutional.

Despite all these new measures and attitudes, our country is still the world's outstanding example of a society based on the principles of private property and private enterprise.

Citizenship

Citizenship has been defined as "membership in a political unit, involving cooperation in public decisions as a right and sharing of public burdens, chiefly military service and taxation, as a duty."

The Fourteenth Amendment has two important references to citizenship. It states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It goes on to provide that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Most of us are familiar with the rights of citizens. They are found in the Bill of Rights, in a number of Amendments (13, 14, 15, and 19) and in the various state constitutions. We also know, in a general way, what the duties of American citizens are: to uphold and obey the laws; to respect the rights of others regardless of race, religion, or nationality; to serve in the armed forces, if called upon; to abide by majority decisions; to study the important public issues of the day; and to vote in all elections for which we may be eligible, after carefully considering the candidates and the issues.

These points are clear and definite. Others are not so obvious. What does the Fourteenth Amendment mean by the "privileges or immunities of citizens"? This amendment was proposed and

ratified to make the Negro a citizen of the United States. It further aimed to empower the Negro to appeal to Congress and to the Federal courts for the protection of his rights as a citizen. This seemed to imply that the protection offered by the clause in question would be quite comprehensive.

However, the "privileges and immunities" clause has become the "stepchild" of the Constitution. There has been no effective analysis and use of this potentially important phrase by the Supreme Court. In *Hague v. C.I.O.* (1939), three of the Justices held that the right to assemble peaceably was included within the "privileges and immunities" clause. Two years later, four Justices decided in *Edwards v. California* (1941) that California's "anti-Okie" law, barring needy persons from that state, was an abridgment of the same clause. But these were minority opinions.

As of now, therefore, the guarantee of the "privileges and immunities of citizens" is vague and of little importance in the strengthening of human rights. However, these words are part of our basic law, and they may still be used by the Court as a bulwark against state infringement of personal liberty. But this is a matter for future decision.

Conclusion—A Discipline of Free Men

Our discussion in this pamphlet has emphasized the role of the Supreme Court in deciding certain fundamental questions in the field of human rights. There is no doubt that the highest tribunal has far-reaching powers in this field. The same is true (in varying degrees) of the lower courts and of our elected officials in Washington, in the state capitals, and in local units of government.

In the last analysis, however, the greatest responsibility for safeguarding and extending our liberties lies with the American people as a whole—with all of us. Only men and women who love freedom can create and sustain a society devoted to human rights. In the face of popular hostility, or even popular indifference, legal guarantees and conscientious courts are not enough to keep the structure of civil rights intact. The forms may survive, but the realities of freedom will crumble away.

What is needed, above all, for the maintenance of human rights is a *discipline of free men.* The word "discipline" is used here to suggest the idea of training and of deliberate self-control to achieve a certain end. Three fundamental attitudes distinguish a society in which such a discipline exists.

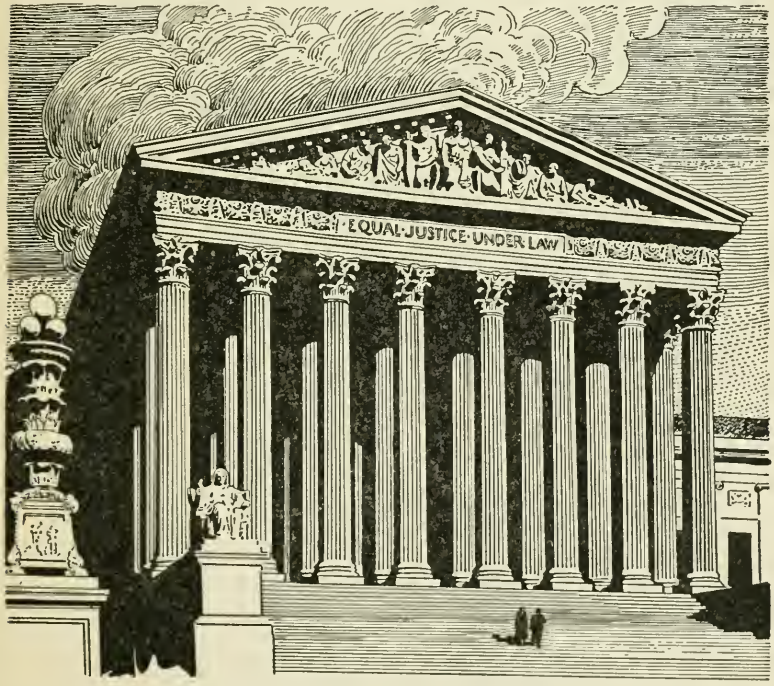
1. *Free men must be intellectually, spiritually, and emotionally in favor of human rights.* Being human, they will undoubtedly have

such weaknesses as prejudices, hatred, fear, and greed. But they will be able to overcome these weaknesses by the strength of their faith in a democratic social ideal.

2. *Free men must be willing to devote time and energy to the study of human rights.* They must be intellectually equipped to understand the nature of these rights and to recognize the dangers that threaten them.

3. *Free men must be willing to act in defense of a free society.* The enemies against whom such action is directed may come from within or from without.

These are not easy requirements. But freedom never has been, and never will be, an easy way of life. A democracy makes demands on its citizens which are unknown in any totalitarian society, whether Fascist or Communist. The American people, however, are proving again today, as they have on so many occasions in their past, that they appreciate the nature and the value of their essential freedoms, and that they are prepared to pay the full price which the perpetuation of their way of life demands.



The Supreme Court Building in Washington, D.C.

THINGS TO DO

1. Suggest to your teacher that the film strip *To Secure These Rights* be shown to the class. This is a simple but eloquent summary of the famous report made by the President's Committee on Civil Rights (1947). It may be borrowed from the Anti-Defamation League, 212 Fifth Avenue, New York 10, N. Y.; or purchased from Film Publishers Inc., 25 Broad Street, New York 2, N. Y.

2. Write to the New York State Commission Against Discrimination, 270 Broadway, New York 7, N. Y. and request literature describing the work of this agency in combating racial and religious discrimination. Also request a list of films which the agency has available for distribution. If you live in a state other than New York which has an anti-discrimination law of this type, write to the corresponding agency in your state.

3. In *What Is Democracy?* (University of Chicago Press, 1941), Professor Charles E. Merriam of the University of Chicago makes the following statement: "It may be said very broadly that the Soviets attempt a form of equality but destroy liberty; that Fascism and Nazism destroy both liberty and equality; but that the democratic state may develop and protect both equality and liberty."

Discuss and analyze in class the meaning of this statement.

4. Choose one of the famous third-party movements of American history (Liberty, Free Soil, Populists, Progressives of 1912, etc.) and show how this group helped to arouse the public conscience and to strengthen human rights in the United States.

5. You will enjoy listening to a splendid set of phonograph records entitled *No Man Is an Island* (Decca Records Album No. A-349). This consists of a collection of famous speeches (by Pericles, Paine, Webster, Lincoln, etc.), all dealing with the theme of brotherhood and the dignity of man. They are read with great dramatic effect by Orson Welles.

6. In 1944, on the occasion of celebrating "I Am an American Day" in New York City, Judge Learned Hand of the United States Circuit Court delivered an address containing the following remarks:

> "The spirit of liberty is the spirit which is not too sure that it is right. The spirit of liberty is the spirit which seeks to understand the minds of other men and women. The spirit of liberty is the spirit which weighs their interests alongside its own without bias. The spirit of liberty remembers that not even a sparrow falls to earth unheeded. The spirit of liberty is the spirit of Him, who, nearly 2000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered with the greatest."

(*a*) What is your reaction to Judge Hand's concept of the "spirit of liberty"?

(*b*) Do you consider these remarks suitable for celebrating "I Am an American Day"? Explain.

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